

# **EXHIBIT**

## **“A”**

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3  
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5 DANIEL KLEEBERG, LISA STEIN, AND  
6 AUDREY HAYS,

7 Plaintiffs,  
8

-vs-

9 LESTER EBER, ALEXBAY, LLC, F/K/A LESTER EBER, LLC,  
10 ESTATE OF ELLIOT W. GUMAER, JR., AND WENDY EBER,  
11

12 Defendants,  
13

and

14 EBER BROTHERS & CO., INC., EBER BROS. WINE & LIQUOR  
CORP., WINE & LIQUOR METRO, INC., EBER-CONNECTICUT, LLC,  
15 EBER-RHODE ISLAND, LLC, EBER BROS. ACQUISITION CORP.,  
EBER-METRO, LLC, SLOCUM & SONS OF MAINE, INC., AND  
CANANDAIGUA NATIONAL BANK & TRUST COMPANY,  
16

17 Nominal Defendants.  
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19 Deposition of FRANK TORCHIO, held pursuant to  
Article 31 of the Civil Practice Law and Rules, at  
Underberg and Kessler, 300 Bausch and Lomb Place,  
20 Rochester, New York, on the 23rd day of August, 2019,  
commencing at 9:30 a.m., before Leah Didsbury Reporter,  
21 Notary Public.  
22  
23  
24  
25

1 APPEARANCES:

2  
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19 Also Present: John Herbert (telephonically)  
20 Patrick Martin  
21  
22  
23  
24  
25

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FRANK TORCHIO

EXAMINATION BY MR. BROOK

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(Retained by counsel)

## EXHIBITS

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1 COURT REPORTER: Do you want him to read and  
2 sign?

3 MR. RAMSEY: Yes, please.

4 COURT REPORTER: Usual stipulations?

5 MR. RAMSEY: Other than read and sign,  
6 that's fine.

7 MR. BROOK: Actually, I don't as a matter  
8 of -- I've always been trained don't as a matter  
9 of what I've always been trained to do, agree to  
10 usual stipulations, because it seems everywhere  
11 usual stipulations means something different. I  
12 agree to the federal rules of civil procedure  
13 governing this deposition.

14 MR. RAMSEY: That's fine.

15 (Whereupon, the following stipulations were entered into  
16 by the respective parties.)

17

18 It is hereby stipulated by and between counsel for the  
19 respective parties that the oath of the referee is  
20 waived, filing and certification of the transcript are  
21 waived, and all objections, except as to the form of the  
22 question, are reserved until the time of trial.

23 FRANK TORCHIO,

24 of Rochester, New York, having been first duly sworn, was  
25 examined and testified as follows:

1 EXAMINATION BY MR. BROOK:

2 Q. Good morning. This is not your first time  
3 being deposed, correct?

4 A. Correct.

5 Q. Is there anything about how this deposition  
6 works that you would like to go over before we begin?

7 A. I don't think so.

8 Q. When is the last time you were deposed?

9 A. Let's see. I think it was in May of this year.

10 Q. All right. So if any issues come up, usually  
11 the biggest one is just talking over each other. I  
12 sometimes am a little slow to get out my question. I am  
13 sure the court reporter will let us know, but that's just  
14 human nature. So what is your understanding of what this  
15 lawsuit is about?

16 A. Well, my understanding of my involvement in  
17 this lawsuit is to valuation, principally of  
18 Eber-Connecticut, the operating company that is owned by  
19 Eber-Metro, in turn owned by Eber Wine and Liquor.

20 Q. Or was owned by Eber Wine and Liquor, rather?

21 A. Sorry. That was correct. Was owned at that  
22 time.

23 Q. And do you understand this lawsuit is largely  
24 about whether the transfer of Eber-Metro from Eber Wine  
25 and Liquor to Alexbay was a valid transaction?

1           A.    Yes, I am.

2           Q.    And what else do you understand about what the  
3 issues are in this lawsuit?

4           A.    Can you be a little more specific about what  
5 issues you're talking about?

6           Q.    Sure. I know you were retained for a  
7 relatively limited purpose. But do you understand that  
8 there are a series of transactions that are being  
9 challenged in this case?

10          A.    I understand the transaction that you're  
11 referring to. The foreclosure of stock that was through  
12 the layers owned by the beneficiaries of the trust.

13          Q.    Okay. And so what is your understanding as to  
14 how the ownership of Eber-Connecticut changed in terms of  
15 the actual individuals who had an ownership interest as a  
16 result of that transaction?

17          A.    Well, at prior to the transaction and I think  
18 my report has a pretty decent depiction of what the chart  
19 looks like. At the top is the trust that I understand  
20 is -- I believe a third of a third of a third to Lester.  
21 A third to Lester. A third to another trust beneficiary  
22 and a third to another trust beneficiary. And as you  
23 make your way down that chart, it is then the entity Eber  
24 Wine and Liquor that owns assets and has other  
25 liabilities. The asset principally then of Eber Wine and

1 Liquor Eber-Metro. And then the main company, the main  
2 operating company -- the main asset of Eber-Metro is then  
3 Eber-Connecticut. And Eber-Connecticut is the principal  
4 entity that I valued.

5 Q. You also looked at liabilities for the parent  
6 companies at some point though, correct?

7 A. Parent companies if you mean Wine and Liquor  
8 and Metro, yes.

9 Q. Why did you do that?

10 A. Well, in conducting a solvency opinion it is  
11 necessary to assess the value of the assets vis-a-vis the  
12 liabilities -- obligations that those entities have to  
13 pay as a going to concern or in liquidation.

14 Q. And I will get more into this later. Did you  
15 conduct any sort of forensic accounting work as part of  
16 your work?

17 A. I am not an accountant. Therefore, I do not do  
18 forensic accounting work. Does that answer your  
19 question?

20 Q. Sure. How did you -- and so calculating  
21 liabilities, what kind of work did you do for that  
22 portion of your report?

23 A. There are a number of liabilities that sat  
24 above -- Eber-Connecticut sat between. Eber-Connecticut  
25 and ultimately the trust. My first assessment is to



1 provide a legal opinion of the from the attorneys about  
2 whether or not those are legal liabilities of these  
3 entities. I am not a lawyer, either. But principally  
4 what I relied on is my expertise and valuing and  
5 understanding how investors view a company and view  
6 liabilities of a company. So that is the -- you know,  
7 once I had an established legal opinion that this was the  
8 case then it was well, okay. Now, let me do the  
9 assessment as to how a willing buyer knowledgeable about  
10 all the facts would assess the company.

11 Q. Okay. So who provided the legal opinion on  
12 what the liabilities were?

13 A. I posed the question to the attorneys that were  
14 on this case and there were a number of them. If you're  
15 asking me who ultimately gave me that opinion, I couldn't  
16 tell you. But it was a conglomerate of the attorneys  
17 that worked on this case.

18 Q. Okay. Is it correct you did not reference that  
19 legal opinion as something you relied upon in your  
20 report, correct?

21 A. I don't know. I thought I had.

22 (Whereupon, Exhibit Number 126 was marked for  
23 identification at this time.)

24 Q. Let's go ahead and mark this as our first  
25 exhibit. Officially, have you looked at this one?

1           A.    Okay. I believe the materials relied upon are  
2           stated in Exhibit B. B as in boy. Yes.

3           Q.    If you want to take a quick look at it. Maybe  
4           I missed it, but I don't see any reference to a legal  
5           opinion that you relied upon your report.

6           A.    No. I didn't mean to imply that there was a  
7           written document. These were in conversations I had.

8           Q.    Okay. So it's fair to say then that you only  
9           mentioned written materials relied upon in this report?

10          A.    That's correct.

11          Q.    Is that your standard practice?

12          A.    It is.

13          Q.    And is it your understanding that -- are given  
14          instructions to only include written materials?

15          A.    No. This has been my practice for 30 years.

16          Q.    Okay. So let's go over then what else you  
17          relied upon. So outside the written materials, you  
18          relied on at least a legal opinion of Underberg and  
19          Kessler of Eber-Metro and Eber Wine and Liquor, correct?

20          A.    That is right.

21          Q.    What else that is not a written document did  
22          you rely upon in forming your opinions?

23          A.    Well, my experience. I mean I can go through  
24          this.

25          Q.    I mean specific to the facts of this case.

1           A.    Well, specific to the case of this case.

2           Q.    Did you have conversations with anyone else  
3 other than the lawyers?

4           A.    My staff, beyond that -- well, I know I spoke  
5 with Lester and Wendy a number of times.

6           Q.    Okay. Then did you rely on those  
7 conversations?

8           A.    Well, I can't point specifically to anything  
9 that I relied on for this particular question that you're  
10 asking, but there were a number of things that I did  
11 incorporate into my analysis.

12          Q.    All right. Let's go to one example and maybe  
13 you can help me understand where you got it from. So  
14 please turn to Page 9 of your report on Exhibit 126.

15          A.    Okay.

16          Q.    In Paragraph 27 you refer to your understanding  
17 of what Eber-Connecticut's financial situation was in the  
18 winter of 2011 to 2012 and then you got a number of items  
19 listed there. Do you see that?

20          A.    I do.

21          Q.    Where did you get that information from?

22          A.    Well, with a footnote 10 the information in  
23 Paragraph 27 is referenced to the auditor's report. And  
24 the numbers A, B, C and D, they would have been from  
25 conversations I had with the attorneys, with Wendy, with

1 Lester. Was there anything else? My recollection is I  
2 also reviewed an affidavit that Lester signed. I believe  
3 that it concerned the Harris Beach litigation. But it  
4 did recount certain facts that lead to -- among other  
5 things, the 2012 transaction.

6 Q. Okay. And did you conduct any attempt to  
7 determine the accuracy of the information that Lester and  
8 Wendy provided either verbally or there in that  
9 affidavit?

10 MR. RAMSEY: Form. Go ahead.

11 A. Well, I certainly did look at the financials.  
12 And I did have those financials recounted there in my  
13 report. I can't up come up with anything more specific  
14 than that. If you ask me some specific questions, I will  
15 try to respond to them.

16 Q. Is it correct that you did not perform any work  
17 to verify the accuracy of the financials?

18 A. No.

19 Q. Did you conduct any effort to determine the  
20 truthfulness of the individuals who were providing  
21 information to you?

22 MR. RAMSEY: I am not sure what you mean  
23 about that. Form.

24 Q. Is it your practice in providing expert  
25 opinions to rely on people and what they say if you

1 determine that those individuals are not trustworthy?

2 MR. RAMSEY: Form. Go ahead.

3 A. I am not sure how to respond to that. You want  
4 me to determine whether someone is trustworthy or not?

5 Q. If someone provides information to you that  
6 sounds absurd, would that be something that you would  
7 rely on just because it was provided?

8 A. That sounds absurd.

9 Q. That sounds like it doesn't make any sense to  
10 you?

11 MR. RAMSEY: Hypothetically, you're talking  
12 here?

13 Q. Yes, in your experience.

14 A. I mean I suppose. I can't recall a situation  
15 where someone's statement rose to the level of what you  
16 would -- what I would consider absurdity. I can't  
17 recollect any particular instance of that occurring. I  
18 suppose that if someone said to me, you know, the sun is  
19 rising from the west. I could consider that absurd, yes.  
20 That hasn't happened to me.

21 Q. Okay. And what about have you ever relied on  
22 the statements of individuals who were determined to have  
23 committed fraud?

24 A. Yes. There have been instances. Generally, my  
25 approach is that if my opinion is predicated on something

1       that is given to me, recounted to me and it turns out to  
2       be false, then I will respond whether or not in court  
3       that particular issue has an impact on my analysis.

4           Q.    If you included facts in your report, does that  
5       mean it necessarily had any impact on your analysis?

6           A.    Well, insofar as the background section is  
7       giving the background. That's basically what it's there  
8       to do. Provide whatever factual basis I have and my  
9       understanding of the situation that occurred back in  
10      2012. You would have to be specific as to whether or not  
11      a line of information or a particular piece of background  
12      affects my opinion.

13          Q.    So let's look at this Paragraph 27-B. You said  
14      it was your understanding that quote, "Eber-Connecticut  
15      suffered as a result of the aggressive competitive  
16      actions of Southern and other competitors and fliers."  
17      Do you see that?

18          A.    I do.

19          Q.    Is that something that was important to your  
20      opinion?

21          A.    Indirectly. It wasn't important to my opinion,  
22      but it fit the circumstances of the case. And I think  
23      that piece of information was derived from the  
24      affidavit -- the signed affidavit by Lester.

25          Q.    What was your understanding of the relationship

1           between Southern and Eber-Connecticut at the time?

2                           MR. CALIHAN: Objection to form. Brian,  
3                           what time period?

4           Q.     Sorry. Paragraph 27 refers to the winter of  
5           2011 to 2012.

6           A.     I believe during that time period Southern, as  
7           I understood from the affidavit -- Southern basically  
8           took over the business -- that's a poor way of putting  
9           it -- made an effort to become a distributor in New York  
10          State. And for the most part, I think it was the single  
11          biggest factor as to why Eber Brothers or whatever the  
12          entity was in New York State left New York State.

13          Q.     Well, this paragraph or this subpar paragraph  
14          refers to Eber-Connecticut. So it was only operating in  
15          Connecticut, correct?

16          A.     Sorry.

17          Q.     And so was it your understanding that Southern  
18          was affecting Eber-Connecticut?

19          A.     You know, I don't recall. I remember the  
20          effect on Southern in New York State. It may well have  
21          been that they were trying to do the same thing in  
22          Connecticut or attempting to, but I don't remember  
23          specifically.

24          Q.     And were you aware of any business relationship  
25          between anyone associated with Eber-Connecticut and

1 Southern?

2 A. I recall an offer made for Southern for  
3 Eber-Connecticut, an offer for 50 percent interest.

4 Q. Were you aware when you formulated your opinion  
5 that Lester Eber was a paid consultant for Southern?

6 A. I do remember that, yes.

7 Q. And did that affect your opinion in any way?

8 A. It did not.

9 Q. Why not?

10 A. It just didn't.

11 Q. What is your understanding of how that  
12 consulting agreement came to be?

13 A. I believe it had to do with the Southern's  
14 movement into my New York State. And I can't remember if  
15 there was a transaction of some kind, but there was some  
16 payment made as I recollect from Southern to Lester or to  
17 Eber Brothers. I can't remember which.

18 Q. Other than speaking with a Lester and Wendy and  
19 other lawyers from Underberg and Kessler, did you speak  
20 with anyone else in connection with obtaining facts for  
21 this case?

22 A. Again, I think I would include my staff in  
23 that. They assisted me going through documents -- those  
24 conversations.

25 Q. Did your staff also speak directly with Lester



1 and Wendy?

2 A. With me, yes.

3 Q. Was it your practice to take notes of your  
4 conversations with Lester and Wendy?

5 A. It's not my practice to take notes.

6 Q. Did you take notes in this instance?

7 A. No.

8 (Whereupon, Exhibit Number 127 was marked for  
9 identification at this time.)

10 Q. All right. And since you've issued the report  
11 my client's expert Glenn Liebman has issued a report.  
12 Have you seen that?

13 A. I have.

14 Q. And I don't have any specific questions about  
15 this now other than -- so after having reviewed this  
16 report, you were given the opportunity to provide a  
17 rebuttal report; is that right?

18 A. Could be.

19 Q. Why was the -- why didn't you end up providing  
20 a rebuttal report?

21 A. I didn't feel it was necessary. I can't  
22 remember exactly if I was that specifically -- if I had  
23 to do a rebuttal report, but I said I am not bothered by  
24 anything in this report. Let's go to trial.

25 Q. Okay. And so let me go ahead and ask you about

1       this. There were a couple of issues that Glenn Liebman  
2       gave an opinion on that were not topics that you directly  
3       addressed, correct?

4           A. If you can be specific, I will be happy to  
5       respond.

6           Q. Do you recall Glenn Liebman provided an opinion  
7       of the value of Eber-Connecticut as of May 31, 2018?

8           A. I think, as I remember, that there was some  
9       criticism that the valuation date that I used was several  
10      days removed from the valuation date that he was using or  
11      determined to be appropriate.

12          Q. I will stop you. That's not what I am not  
13      referring to. I am referring to 2012.

14          A. I beg your pardon.

15          Q. If you turn to Page 19 of Exhibit 127. That  
16      will refresh your recollection.

17          A. Page?

18          Q. 19.

19          A. Okay. I am there.

20          Q. So this was essentially based on the most  
21      recently available financial information providing a  
22      valuation of Eber-Connecticut using eventually the same  
23      general approach that both you and Mr. Liebman used,  
24      correct?

25          A. The same general approach, yes.

1           Q.    And you reviewed this and you said you did not  
2    see any problems with this; is that right?

3                   MR. RAMSEY:   Form.   Go ahead.

4           A.    I was not asked to respond to this analysis.

5           Q.    Okay.   And so you have not, in your work in  
6    this case, formed any opinions as to whether this is  
7    correct or not is that right?

8           A.    Well, if you're asking me if I looked at this  
9    and formed an opinion, I have.

10          Q.    But that is not an opinion that you intend to  
11   introduce in this case?

12          A.    I would be happy to introduce it in the case.  
13   You want to ask me what it is?

14          Q.    Since it's not in a report, I think it's just  
15   as well.   Well, look.   I don't think it changes the  
16   admissibility.   So, go.   Please, do tell me your opinion  
17   on part of it.

18          A.    I didn't do a full assessment of the valuation,  
19   but I tried to do a bit of a sanity check on this  
20   valuation.   And my recollection -- and this was back at  
21   envelope stuff.   But my recollection is that if you took  
22   EBITDA ratio -- I believe that EBITDA ratio -- his value  
23   to the -- pardon me.   His value to EBITDA as of 2018, I  
24   believe that number is something like 40 times EBITDA.  
25   The valuation is 40 times the amount of EBITDA in that

1 year. So I asked my people, I said, "Well, it seems high  
2 to me. Let's see if that really is high." So we went  
3 and we have access to all the companies -- all the  
4 publicly traded companies on Nasdaq and NYSE. So there  
5 was approximately 2,800 companies we downloaded their  
6 EBITDA ratios for all those 2,800 companies. The ratio  
7 of 40 would put you into the upper 10 percentile bracket.  
8 So the highest 10 percent of all 2,800 companies traded  
9 in the United States. This would put them in that  
10 category. So I said, "Well, that's interesting." I said  
11 that indicates, you know, substantial growth rate implied  
12 by the EBITDA multiple. I said let's take a look at the  
13 last three years' growth rate -- compounded growth rate  
14 for those companies in the upper 10 percentile -- these  
15 public traded companies. So the average and median  
16 growth rates for the last three years leading up to the  
17 2018 valuation was 14 and a half and 15 percent median  
18 and mean. So it is showing very substantial growth in  
19 the last three years, which is consistent with a high  
20 EBITDA multiple. I then said let's look and said what  
21 the growth rate has been for Eber-Connecticut over the  
22 same three years. Now that growth rate is something --  
23 the compounded average growth rate is something like  
24 three percent. So you start to see the somewhat  
25 inconsistencies here that this valuation at least at a

1       sanity-check level appears to be quite aggressive given  
2       the growth rate that Eber-Connecticut has exhibited given  
3       that the implied multiple is in the 40 percentile  
4       bracket -- excuse me -- in the upper 10 percentile  
5       bracket. There is an inconsistency with the degree of  
6       growth. So effectively what this analysis would imply is  
7       that you could -- one would expect given this multiple a  
8       growth rate of 15 percent over the next three years  
9       compound annual growth rate or more. And that seems  
10      highly unlikely to me. So that is the, you know, the  
11      only analysis I did. Just to say -- this appears high.  
12      Is it high? It is high. And it is inconsistent with the  
13      market data.

14           Q. Well, the market data there is a lot of things  
15      that doesn't account for any particular circumstances of  
16      any particular company, right? It's just you're looking  
17      at a --

18           A. On average it does account for what the  
19      expectation of growth rate is for companies that have  
20      high multiples. I mean, if you would like I can write  
21      down for you the formula that explains the relationship  
22      between a multiple and growth rate. It is a algebraic  
23      relationship.

24           Q. As a part of your -- did you do anything else,  
25      as you called it, a sanity check on this number?

1           A.    No.  I think that's all I did.

2           Q.    Did you consider the fact it's still a lower  
3           number than what Eber-Connecticut was bought for 14 years  
4           ago?

5           A.    My sanity check is what it is.  I looked at the  
6           analysis of how this fit with publicly traded companies.  
7           And all I am saying it was well outside the norm for  
8           these publicly traded companies that have those kinds of  
9           EBITDA multiples.

10          Q.    Are you aware of any publicly traded companies  
11          that operate as wine or liquor distributors in franchise  
12          states?

13          A.    I know that we did search for that, but that  
14          would have been as of 2012 from my valuation work.  And I  
15          know why we limited it to those companies that had  
16          negative EBITDA.  And we did not find any liquor  
17          distributors -- pure-play liquor distributors that would  
18          fit that criteria.

19          Q.    And why didn't you even look to see if there  
20          was someone that was in the same line of business, but  
21          with a positive EBITDA?

22          A.    There was a strong relationship between the  
23          multiples -- valuation multiples and whether or not  
24          you're profitable.  And at that point in time  
25          Eber-Connecticut had exhibited a number of years -- I

1 think maybe as back as far as 2007 -- that showed  
2 negative profit -- negative EBITDA. So that has a very  
3 specific relationship between your comparables. One of  
4 the strongest relationships between comparables that  
5 you're going to choose. So I limited it accordingly to  
6 those companies that had negative EBITDA.

7 Q. You can do an enterprise value revenue  
8 assessment of a company whether or not its EBITDA is  
9 positive or negative, right?

10 A. You certainly can. But it's not relevant if  
11 the company you're looking at has extraordinarily high  
12 profitability. Let's say their profit margin is 10  
13 percent and the company you are trying to elevate has  
14 continual profit margins of negative percentage 10, 15,  
15 whatever the case may be. That would imply those are not  
16 comparable. And one of the key areas for comparability  
17 is profitability.

18 Q. So in your opinion when a company is  
19 profitable, is the enterprise to value to revenue ratio  
20 multiple higher or lower than when it's not profitable?

21 A. Generally when a company is not profitable the  
22 radio is lower.

23 Q. So in this case on Page 19, the enterprise  
24 value to revue multiple, that was based off of indicators  
25 of value that occurred when Eber-Connecticut was not

1       profitable, correct?

2           A.    I don't recall what he based it on.

3           Q.    The Southern offer and Eder-Goodman transaction  
4       refers to negative EBITDA on both of those time periods.  
5       Do you see that?

6           A.    So he is referring to the EBITDA of  
7       Eber-Connecticut?

8           Q.    Correct.

9           A.    Yes.

10          Q.    And so in your opinion then as of 2018, once  
11       the company was profitable, value to revenue multiple  
12       should actually be higher, correct?

13          A.    Well, it would be higher than what it was in  
14       2012. Of course I disagree with the numbers he has got  
15       here. I've got numbers that are lower than that.

16          Q.    If we used your numbers say, those would still  
17       be too low as of 2018 profitable, correct?

18          A.    I am sorry.

19          Q.    Putting aside the exact number, it's your  
20       opinion that once the company became profitable by 2018  
21       at least that the enterprise value to revenue multiple  
22       that was used from a period of unprofitability would be  
23       too low to accurately value the company?

24          A.    That is a plausible inference. That would be  
25       something that one would do in assessing. To do to a



1 comprehensive analysis, I would certainly think about  
2 that. It wouldn't be the only thing I would think about.  
3 As I said, I did not do an analysis valuation. I am just  
4 giving my insights as to what the implications of his  
5 valuation is period.

6 Q. What do you ever consider what settlement  
7 offers have been made in a case in determining whether,  
8 you know, a particular valuation meets a sanity check?  
9 Have you ever considered --

10 A. A settlement offer in litigation like this?

11 Q. Yes.

12 A. To use that as the basis?

13 Q. Not as the basis. You referred earlier to a  
14 sanity check. What did you mean by that?

15 A. Well, I think I fairly well described to you  
16 what I mean by that sanity check is to look at the  
17 implication in this instance -- the implication of the  
18 valuation vis-à-vis companies that have a high EBITDA  
19 multiples who have on average high growth rates. And  
20 compare that with the growth rates for Eber-Connecticut  
21 over that same pre-three-year time period. That was the  
22 sanity check. It's very simple. It's just looking at  
23 publicly traded companies and saying whether or not the  
24 inference from this analysis makes sense with regard to  
25 publicly traded companies.

1           Q.   Does management's opinion of what a company is  
2   worth ever affect your assessment of whether a valuation  
3   is reasonable or not?

4           A.   Well, I guess it depends on the assignment. I  
5   certainly listen to what management has to say.  
6   Management are the frontline. They know the business. I  
7   am not an expert in wine or liquor or any other business  
8   for that matter other than consulting. But I am a  
9   valuation expert. So I do consider anything that  
10  frontline managers have to say about how they run their  
11  business, how other companies run their businesses. So I  
12  consider it. Whether or not it's used in any meaningful  
13  way is -- that's really depending on the particular facts  
14  and circumstances.

15          Q.   Did you discuss the approximate current value  
16  of Eber-Connecticut with Wendy or Lester?

17          A.   No.

18          Q.   So you did not ask Lester, for example, whether  
19  he thought the value used by Mr. Liebman of 20.4 million  
20  dollars was an reasonable valuation for the company at  
21  this time?

22          A.   No.

23          Q.   Why not?

24          A.   Well, as I said before, all I did was do a  
25  sanity check based upon publicly traded companies. I was

1 not trying to do my own comprehensive analysis or opinion  
2 as to what the valuation was in 2018. I wasn't asked to  
3 do it. I didn't do it. But I was curious, and I wanted  
4 to see whether or not the numbers put forward by Liebman  
5 made sense relative to publicly traded companies.

6 Q. This is not a publicly traded company though,  
7 correct?

8 A. No. Not that it matters. But no, it's not  
9 publicly traded.

10 Q. Why doesn't that matter?

11 A. Why would it matter? Publicly traded companies  
12 are often used to value private companies. Your question  
13 seems to implicate or imply that it's not within the  
14 principles valuation to use multiples for publiclytraded  
15 companies to value a private company. That is false.  
16 You can. You do. It's actually prescribed in valuation  
17 textbooks like Pratt. So I, you know, that's why I  
18 answered the question that way I answered. The only  
19 thing that is very important when you're valuing a  
20 private company use public multiples is that you've got  
21 to take an account of marketability for the private  
22 companies. So if anything the value is going to be  
23 lower. Not higher.

24 Q. So the inability for the private company owners  
25 to transfer their shares, for example, results in a lower

1 valuation?

2 A. Yes. There generally is a marketability  
3 discount if you're trying to sell let's say, you know,  
4 you're thinking about five shares to somebody. Well,  
5 then you normally would be taking a marketability  
6 discount because the buyers of a private company are  
7 going to price protect themselves when they try to sell  
8 those shares.

9 Q. I want to turn your attention next session,  
10 which is another part of the Liebman report that was not  
11 responding to something that you did. It's concerning  
12 the economic rationality of the Eber Brothers board's  
13 decision to consent to the transaction of Eber-Metro from  
14 Eber Wine and Liquor to Alexbay. Did you review that  
15 part of the Liebman report?

16 A. I know I read it, but point me to the page and  
17 I will reread it.

18 Q. The very next page.

19 MR. RAMSEY: Do you want him to read the  
20 whole thing?

21 Q. I was just wondering if he had read it before.

22 A. I had, but it's been a while.

23 Q. Let me know when you had a chance to refresh  
24 yourself.

25 A. Okay. What is your question?

1           Q.    So did you form any opinions -- I understand  
2           you didn't put it in a report and it's nothing official,  
3           but I want to know -- did you form any opinions about  
4           whether you agreed with any of the statements in this  
5           section?

6           A.    Well, I generally disagree with the conclusion,  
7           you know.

8           Q.    Just so we're clear, there are a couple of  
9           conclusions in here, which conclusion are you referring  
10          to?

11          A.    There is no economic rationale.

12          Q.    Okay.

13          A.    When -- again, if you go to the hierarchy and  
14          you look at the numbers that I came up with, yeah. I do  
15          agree that Eber-Connecticut had positive value. The  
16          implication of expected values -- the present value of  
17          those cash flows are greater than the liabilities at the  
18          Eber-Connecticut level. As you work that way up that  
19          chain when the other liabilities start to present  
20          themselves and are offset by these assets of  
21          Eber-Connecticut, in my opinion, that turns negative. If  
22          it's negative there is an economic rationale.

23          Q.    What is that rationale? Maybe I can direct  
24          your attention to the fourth paragraph on Page 20. It  
25          addresses that specific thing, and I am curious as to

1       whether --

2                       MR. RAMSEY: Let him answer the question.

3               A. I am not sure what -- you asked me about  
4       rationale. Let me explain it to you. So I am just going  
5       to draw you a picture. You can have this. This is  
6       something that -- it's an analysis that applies option  
7       theory to the various claims in a publicly traded  
8       company. So these are debt obligations and these are the  
9       equity. These are the payoff functions. Now what  
10      happens that when the value of the firm is high -- this  
11      is the line that's the value of the firm -- when it's  
12      high, the equity has value. As the value of the firm  
13      declines, we go this way. You see the value of the  
14      equity declines. Ultimately it goes to zero when the  
15      obligations kick in. So you can think of -- this is kind  
16      of a payoff of a call option. But you can think of this  
17      where this is the exercise price. You can think of this  
18      as face value of the liabilities. Okay. So if the value  
19      in the case of Metro Wine and Liquor -- if the value of  
20      that goes down such that now you got a situation where  
21      the value of the company is actually less than the value  
22      of the liabilities. You're down here someplace. Now, in  
23      those situations the value of equity has zero value. Not  
24      negative, but zero.

25              Q. At least at that sliver of time, right?

1           A.     Yes.

2           Q.     Value changes over time all the time in a  
3     company, right?

4           A.     Well, I mean, look, you can always speculate  
5     about whether value is going to go up or down. But the  
6     point up when you do a valuation as of a particular date,  
7     you're doing a valuation that it accounts for, you know,  
8     what those expectations are, what your best guess of  
9     those expectations are. That's how you do a valuation.  
10    So there is the economic rationale. If the value of that  
11    equity goes to zero, then the debt holders become de  
12    facto the residual claimant for those assets. That's why  
13    you see this thing declining. It looks kind of like  
14    equity, doesn't it? That's exactly what happens. The  
15    debt holders become de facto the residual claimant or the  
16    equity holder to the company. And the equity holders go  
17    away.

18          Q.     So it's your understanding then --

19          A.     You can keep that.

20          Q.     We will mark that as Exhibit 128.

21                 (Whereupon, Exhibit Number 128 was marked for  
22     identification at this time.)

23          A.     This is actually an analysis by Robert Merton  
24     who has won a Noble prize for this.

25          Q.     Let me make sure I understand you correctly.

1       So in your understanding of how a corporation works, once  
2       a corporation determines that it is insolvent in that its  
3       debts exceed the valuation of its equity or its assets --

4             A.    Assets.

5             Q.    Then at that point there is no longer any  
6       obligation for that company to generate shareholder  
7       value?

8             A.    There is an -- this is interesting because once  
9       a company goes to financial stress, the company not only  
10      has an obligation to maximize shareholder value but to  
11      maximum all claimants' values.

12            Q.    Right.

13            A.    So, yes. That's right. Now in this  
14      situation --

15            Q.    Let me stop you there because I think the  
16      transcript is going to be a little crazy. So you said  
17      not only maximize shareholder value --

18            A.    Sure.

19            Q.    So the obligation to maximize shareholder value  
20      still exists then if the opportunity were to arise,  
21      correct?

22            A.    Sure.

23            Q.    Okay. It's not like the obligation to act for  
24      the benefit of shareholders vanishes upon insolvency?

25            A.    Right. Let me finish. Now you've got an



1 obligation to the debt holders, the obligors here in this  
2 particular instance. And you cannot then, you know, do  
3 something that would harm them because of the equity  
4 holders. That would be incorrect.

5 Q. That would be a breach of judiciary?

6 A. Yes, it would. So you can't just say, you  
7 know, by gosh. I like these shareholders. I am going to  
8 give them some carrot here to keep them going. And the  
9 bondholders are going, wait a second. Wait a second  
10 here. You've got an obligation to me. This thing is  
11 below my face value of debt. Now the obligation goes to  
12 me. And you can't just wealth transfer to shareholders  
13 because you like them.

14 Q. Well, can you wealth transfer to one creditor  
15 the exclusion of the others?

16 A. Generally, you've got take in. So I can make  
17 this more complicated by looking at the priority of these  
18 claims. So you're going to have some claims that have  
19 higher priority than others. Unsecured debt has a lower  
20 priority than secured debt. So you can have a series of  
21 these kinds of charts where the first unsecured debt  
22 starts to go down. But the value of secured debt does  
23 not change.

24 Q. Right.

25 A. Then if goes below the unsecured debt, now you

1 got a situation where the secured debt becomes the  
2 residual claims.

3 Q. Are you aware that at least two of the  
4 unsecured creditors of Eber Wine and Liquor ended up  
5 suing in relation to the transfer to Alexbay?

6 A. I know that there was lawsuits. I think you  
7 might be referring to Harris Beach.

8 Q. And Harris Beach and also the Pension Benefit  
9 Guarantee Corp -- PBGC?

10 A. Yes, absolutely.

11 Q. It was your understanding that Lester's loans  
12 were secured, correct?

13 A. That is my recollection.

14 Q. And do you understand in the case the  
15 plaintiffs have challenged the legitimacy of that  
16 security agreement?

17 MR. RAMSEY: Form. Go ahead.

18 A. That could be. I don't remember.

19 Q. I will represent to you -- you're an expert.  
20 So we do some hypotheticals. So hypothetically speaking,  
21 if the security agreement between Lester and the company  
22 were invalidated --

23 A. The security agreement is invalidated.

24 Q. So those are not secured loans anymore.

25 A. It is a loan though -- unsecured loan.

1           Q.    In that instance, could the company have given  
2           a preference to Lester's loans over other unsecured  
3           loans --

4                   MR. RAMSEY:   Form.   Go ahead.

5           Q.    -- when it was insolvent?

6                   MR. CALIHAN:   Objection to form.

7           A.    It sounds like you're asking me for a legal  
8           conclusion here.   I can tell you as an economist, as a  
9           valuation expert, if you tell me it has priority over the  
10          equity holders, that's all I care about.   Whether they  
11          stand in line of or in front of PBGC, I am not sure at  
12          all how that affects this analysis that I just provided  
13          to you.   As I mentioned before, this would -- if I drew  
14          this chart -- one more chart below these could be  
15          unsecured debt.   The same analysis would apply.   They  
16          stand ahead of -- they are in front of the secured debt,  
17          but they certainly have priority on the equity.   And  
18          that's the question you initially posed to me, the  
19          economic rationale of that transaction.   So I am not sure  
20          how the hypothetical of whether it's secured or unsecured  
21          affects this analysis.

22          Q.    Let me ask you this then.   In terms of economic  
23          rationale, in your opinion, was there any conceivable  
24          benefit for the shareholders by consenting to let  
25          Eber-Connecticut and Eber-Metro be transferred out of the

1 trust assets and over to Lester Eber alone?

2 MR. RAMSEY: Form. Go ahead.

3 A. Was there any benefit? Could you repeat that  
4 question? That was confusing.

5 Q. I will rephrase. I guess, let's just look at  
6 this fourth paragraph. There are a few statements and I  
7 am curious whether you agree with them.

8 A. Okay. Paragraph what?

9 Q. The fourth paragraph on Page 20. We will go  
10 line by line. In this paragraph -- and you don't have to  
11 agree with the first one for the record. Here Mr.  
12 Liebman states that the lack of economic justification is  
13 apparent even if the net value was significantly lower or  
14 even negative at the time. And it was, just so we're  
15 clear, in your opinion the net value was negative at that  
16 time of the Alexbay transfer, correct?

17 A. Correct.

18 Q. So the next sentence says that is because  
19 Eber-Metro reflected Eber Wine and Liquor Corp sole  
20 operating asset. The fact stated there that it was the  
21 sole operating asset, you would agree with that, correct?

22 A. Yes. You know, because Eber-Metro owned  
23 Eber-Connecticut, which is the operating asset. With  
24 that caveat, yes.

25 Q. And next sentence says quote, "As long as

1        company remains going concern it has the potential for  
2        positive value." Do you see that?

3            A.    Uh-huh.

4            Q.    Do you agree with that statement?

5            A.    I mean as a general matter, that's fine.

6            Q.    Next sentence quote, "This could happen in any  
7        number of ways. Even if it was insolvent it could  
8        potentially restructure through bankruptcy proceedings  
9        and emerge capable of generating positive shareholder  
10       value." Do you agree with that statement?

11           A.    Sure, it's possible. You can always imagine  
12       restructuring. This was a form of restructuring. It's  
13       eliminating the equity holders. And it allows the debt  
14       holder to become the residual claimant. So it is in fact  
15       restructuring. As far as I know, there is no legal  
16       obligation to continue to keep equity holders as equity  
17       holders when the value of their equity is zero. Again,  
18       that's a legal determination. And all I can tell you is  
19       from my experience that's the case. Let me give you a  
20       specific example. There is a company that was in  
21       Delaware -- a big case in Delaware called Trados. Very  
22       similar circumstances to this. It was a merger. You can  
23       think of it as a restructure. And the preferred had --  
24       again, it was a priority claim on the preferred  
25       shareholders. And the opinion is that because the

1 company did not do well -- wasn't doing well. And the  
2 merger price -- it didn't even cover the value of the  
3 preferred stock. So in the merger the preferred stock  
4 got all the proceeds from the merger. Common stock got  
5 zero. The common stock sued saying, "Well, you know, why  
6 is the responsibility on us?" The court says, "Doesn't  
7 exist." As of this date, this valuation is zero.

8 Q. So valuation was based on an actual  
9 transaction?

10 A. Yes. Well, the value -- the merger transaction  
11 was the merger transaction. The valuation was based upon  
12 the value of the common stock at appraisal.

13 Q. Was that an arm-length transaction?

14 A. The price paid?

15 Q. Yes.

16 A. Certainly the judge accepted it as such.

17 Q. In this case, you understand that this was not  
18 an arm's-length transaction that occurred between Lester  
19 Eber and --

20 MR. RAMSEY: Objection. Form. Go ahead.

21 A. I am sorry.

22 Q. In terms -- Lester Eber was an insider to the  
23 company, correct?

24 A. Yes.

25 Q. And did the fact that Lester Eber was a

1 co-trustee of the trust that owned the company affect  
2 your opinion in any way?

3 A. Are you asking me whether that it somehow  
4 caused me to change the numbers or do a different  
5 valuation?

6 Q. I am asking if it affected your opinion in any  
7 way.

8 A. No, it didn't.

9 Q. Do you consider that to be more a legal matter  
10 than a valuation matter?

11 A. Well, I am taking the structure as given.  
12 Look, if somehow somehow you convince the judge that none  
13 of this stuff is valid. Not my valuation, but the whole  
14 structure of this thing is invalid, then my valuation  
15 becomes invalid. It's predicated on this being a valid  
16 transaction on the company with providing me with valid  
17 information. If those things go out the window because  
18 you've proven your case that everything is fraud, so be  
19 it. I am out of it.

20 Q. So is it fair to say -- let's step back. Have  
21 you ever heard of the entire fairness doctrine?

22 A. Yes.

23 Q. Is it fair to say -

24 A. This comes up in mergers.

25 Q. There are two components to that. One is fair

1 value and fair process, correct?

2 A. Exactly.

3 Q. And is it fair to say you are only an expert on  
4 the issue of valuation, not process?

5 A. I think that is generally the case. So I have  
6 been in a number of appraisal actions where the process  
7 as well as the price issues the contention. As a general  
8 matter, I do not get involved in the process. If the  
9 judge finds the process is invalid, well okay. So be it.  
10 But my valuation is my valuation.

11 Q. Okay. So let me ask you this. So getting back  
12 to the issue of the economic rationality. So you agree  
13 there is at least potentially -- some potential for  
14 positive value as long as the company has a going concern  
15 as one of its assets; is that correct?

16 MR. RAMSEY: Form. Go ahead.

17 A. I am sorry.

18 Q. Some potential for future positive value?

19 A. Maybe. Maybe not.

20 Q. So that's a yes, there is potential?

21 A. It's possible.

22 Q. Once the going concern asset is removed from  
23 the company and all that's left with is liabilities and a  
24 small amount of cash that is way less than the amount of  
25 liabilities, there is no possibility of future value,



1 correct?

2 A. Say that again.

3 Q. Once the company no longer has any going  
4 concern assets and only has a huge amount of liability  
5 and a much smaller amount of assets, at that point there  
6 is no shareholder value for good, correct?

7 A. I mean it depends, right? It depends on what  
8 those assets are.

9 Q. Say it's just cash in a bank.

10 A. Cash in bank. Okay. Go ahead.

11 Q. So at that point, do you see any way in which  
12 the shareholder can ever have positive value?

13 A. I don't know. It could be. Anything is  
14 possible.

15 Q. Can you think of any way that would happen?

16 A. Boy. I mean something that could cause the  
17 liabilities to go down over time and the cash remain the  
18 same. I don't know.

19 Q. So short of liabilities being reduced and for  
20 some reason the debt holder is deciding not to take the  
21 cash --

22 A. You get double-digit inflation like we had in  
23 the 1970s, you know. It's very difficult to respond with  
24 a specific answer to those kind of questions. It's a  
25 strange hypothetical.

1           Q.    Sure.  So let's use specific numbers if it's a  
2           little bit easier.  Not the exact dollar amounts in your  
3           analysis, but roughly there.  After the Alexbay transfer,  
4           the debt to Lester Eber and Alexbay was eliminated,  
5           correct?

6           A.    Yes.

7           Q.    So you were left with approximately eight  
8           million dollars in debt owed by, according to your  
9           report, Eber Brothers Wine and Liquor, and then a little  
10          bit less than that, let's say 7.5 million by Eber  
11          Brothers Metro.  Okay.  Does sound about right?

12          A.    I think so.

13          Q.    Okay.  So let's say 7.5 million dollars in debt  
14          and \$362,000 in assets for Eber-Metro.  Were those of the  
15          holdings of the company short of stagflation and banks  
16          deciding to pay incredible interest rates or making a  
17          remarkable investment with that amount of cash, can you  
18          think of any way in the normal operation of a business or  
19          holding company that the shareholders in that situation  
20          that the company could receive value -- positive value?

21                   MR. CALIHAN:  Objection to form.

22          A.    I don't know.  Not sitting here I can't think  
23          of a plausible way other than the things that I talked  
24          about before.

25                   (Whereupon, Exhibit Number 129 was marked for

1 identification at this time.)

2 Q. This is Exhibit 129. I am showing you what's  
3 been marked as Exhibit 129. Do you recognize this?

4 A. Yes.

5 Q. What is this?

6 A. This is the exhibit that underlies the  
7 valuation based upon the Eder-Goodman transaction in  
8 2008. And it is revised to account for the incorrect  
9 methodology of applying the premium reduction for two  
10 items with regard to this transaction.

11 Q. Which two items are that?

12 A. So there are two things that are required to  
13 adjust the actual purchase price. One is that the  
14 transaction included -- both reflect the transaction  
15 included certain valuable rights that were obtained by  
16 Eder-Goodman extensively part of the purchase price. So  
17 they have to be reduced -- the purchase price has to be  
18 reduced to reflect the value of those particular rights  
19 in order to come up with a valuation or an attempt to  
20 come up with valuation of Eber-Connecticut absent the  
21 rights.

22 Q. And so one of those rights, the right of first  
23 refusal, you analogize to a control premium; is that  
24 right?

25 A. Well, I don't know if the analogy is what I am

1       referring to. I think it to put in a more direct  
2       connection the ROFR effectively limit to obtain a control  
3       premium in the future.

4             Q.    So we're clear for the record, by ROFR you mean  
5       right of first refusal?

6             A.    Yes.

7             Q.    So were these the corrections that were based  
8       on what the Liebman report had pointed out in terms of  
9       flipping a discount with a premium?

10            A.    Exactly.

11            Q.    In fact on some of your of analysis, you didn't  
12       have to make the correction because you did it correct in  
13       the first instance, right?

14            A.    Correct.

15            Q.    When you first did the calculation, you  
16       combined the two premiums 15 percent and 25 percent and  
17       then you did a 40 percent reduction, correct?

18            A.    Yes, I don't remember.

19            Q.    Okay.

20            A.    It could be.

21            Q.    All right. If you want to take a look at  
22       Exhibit 126. If you want to check, 1.8 million, which is  
23       the premium you calculated here, is 40 percent of  
24       4.5 million, right?

25            A.    Yes, it is.

1           Q.    Okay.  So it's fair to say that you took the  
2           15 percent ROFR premium and the 25 percent preferred  
3           premium and just combined them?

4           A.    Let me double-check because it seems odd to me.  
5           So does the discount.

6                   MR. RAMSEY:  She is taking down everything  
7           you say.  So keep it to yourself.

8           A.    So I multiplied them independently and then  
9           added up the one.  So it is .15 to times 4.5 million and  
10          then .25 times and 4.5 million.  Added those two numbers  
11          up.

12          Q.    And so both instances you made sure the premium  
13          was applied to the base price.  Not the enhanced price?

14          A.    In the initial report.

15          Q.    Do you believe that was incorrect?

16          A.    Yes.  I think I agree with what Liebman said is  
17          that these things should be divided by one plus premium.  
18          I originally had written the report to reflect it as a  
19          discounted and decided to change it to a premium and  
20          somehow it didn't get to my people who did the  
21          spreadsheets.

22          Q.    There was a couple of sentences that seemed to  
23          conflict with each other.  But treating it as a premium,  
24          but you didn't just change the way it was calculated to a  
25          discount to a premium.  You also made it so the premiums

1       were consecutive or accumulative in your revised chart.

2           A.     That's the appropriate methodology after he  
3     pointed out I didn't divide -- I multiplied the price  
4     instead of dividing to get the stand-alone. I made sure  
5     that we adhered to the way that the literature  
6     suggests -- well, requires to accommodate that.

7           Q.     So when dealing with the situation of multiple  
8     premiums, the literature says that the way you calculated  
9     in the revised C1 is the way to do it?

10          A.     Yes. I think it's Bruner that discusses this.  
11     And if you give me a second, I think I can give you the  
12     exact site. Well, I can't seem to put my finger on it.  
13     But I know the author is Bruner.

14          Q.     I will --

15          A.     I can dig it out.

16          Q.     I will request that. I am not saying it's  
17     going to be sufficient for whatever disclosure reason or  
18     anything, but I request that the underlying rationale,  
19     whatever is being used to support the calculation  
20     methodology, be disclosed to us. I just want to make  
21     sure we're talking about the same thing. In your view,  
22     if you take what the adjusted price -- the base price --  
23     the real equity value of the common shares --

24          A.     Uh-huh.

25          Q.     -- you then add a premium for the preferred.

1           A.    Yes.   And divide by one plus the premium for  
2   the preferred.

3           Q.    Okay.   So once you actually -- after having  
4   calculated the preferred, but I am actually doing it  
5   backwards.   Not how you got to here.   I am just trying to  
6   see how it works and to make sure this is right -- sanity  
7   check.   Starting from the adjusting price.

8           A.    Yes.   Okay.

9           Q.    So you're saying that the way, you know, if you  
10   were calculating what Eber or Eder-Goodman should have  
11   paid based on that price, you would add a two premiums,  
12   right?   One for preferred and one for right of first  
13   refusal, correct?

14          A.    So I would first account for the preferred  
15   premium by multiplying the stand-alone price times one  
16   plus the premium.   Then I get a value.   Then I take that  
17   value and multiply it times one plus the ROFR.

18          Q.    And why do you do the preferred premium first?

19          A.    You can do the ROFR first if that's okay.

20          Q.    Does that affect the ultimate value?

21          A.    No.

22          Q.    And so why is it appropriate to apply -- if you  
23   can do it either way, why is it important to apply one  
24   premium to the enhanced value or the already premium  
25   enhanced value rather than applying both to the based

1 value, right? Because it's a premium paid on the true  
2 equity value, shouldn't the premiums both be based on  
3 that true equity value and not taking into account a  
4 totally separate premium? Because then you're paying a  
5 premium on a premium, right?

6 A. No. I think that's the formula.

7 Q. In this instance the parties themselves did not  
8 break out any particular allocation of premiums, correct?

9 A. No.

10 Q. And in terms of how it affects your ultimate  
11 opinion on insolvency, it's actually very important to do  
12 it the way that you did and not the way I was describing  
13 where you apply both premiums to the base value, correct?

14 A. To my ultimate opinion?

15 Q. Yes.

16 A. No.

17 Q. So you haven't done the math to see that if you  
18 do it the way you originally did it and apply the  
19 premiums to the base value that it actually ends up being  
20 a solvent company?

21 A. I think you're suggesting does that particular  
22 valuation result in a positive number if you did the --  
23 computed the premiums differently.

24 Q. Yes.

25 A. And the answer to that is yes, it would. Would



1       it change my opinion? No, it would not.

2           Q.     So this was -- so in fact in addition to  
3     correcting the error that the Liebman pointed out, you  
4     corrected another error. And that helped you to maintain  
5     an opinion --

6           MR. RAMSEY: Form. Go ahead.

7           A.     So that's the appropriate methodology to assess  
8     the premiums. When you have discrete premiums for  
9     different rights that are being applied. So I adhered to  
10    what the literature stated to do. The prior analysis had  
11    to do with discounts. And as I discussed earlier, that  
12    was a mistake.

13          Q.     Right.

14          A.     It was an error made in that calculation.

15          Q.     And because actually when you're doing it in  
16    terms of discounts, doing it the way you originally did  
17    it resulted in the lowest number, right?

18          A.     Well, it does.

19          Q.     You have been shopping before, right, and they  
20    say take an additional 10 percent off. That doesn't end  
21    up being accumulative. That's how the stores actually  
22    make you feel like you're getting a better discount than  
23    you are. You did in the way the first instance that  
24    would result in the lowest number. And in the second  
25    instance you switch the order and did it again in the way

1           that results in the lowest number?

2                       MR. RAMSEY:   Form.

3           A.    I don't know if that's true.  I just tried to  
4   correct the error that Liebman pointed out and tried to  
5   correct it in the proper way based on what the literature  
6   suggests.

7           Q.    I look forward to seeing that literature.  Is  
8   there any margin of error when you conduct a valuation?

9           A.    Well, no valuation is so precise that it is  
10   with 100 percent certainty.  So there is always some  
11   degree of uncertainty that reflects a valuation.  That's  
12   why you do a number of different valuations, you know,  
13   try to do different measures to try to understand, if you  
14   will, the degree of uncertainty and to account for that  
15   in having a range of values that obtains from different  
16   measures of valuations.

17          Q.    Suppose you're -- we're talking hypothetical  
18   world.  Say that you are dealing with a valuation.  You  
19   don't have anything except for one sort of calculation.  
20   Not like the five here.  You got one prior transaction  
21   and that's what you're basing your valuation on.  Are you  
22   saying in that instance there would not be any margin for  
23   error in your valuation?

24          A.    No.  I am not saying that.

25          Q.    So there is -- is there any sort of way to

1 quantify that margin of error in that valuation method?

2 A. Well, you could. You could. I think the  
3 key -- let's go through each of the valuations. So I  
4 would say that the key problems with these valuations are  
5 the kinds of things that you would do sensitivity  
6 analysis on to see whether or not or see how that affects  
7 the --

8 MR. RAMSEY: Are we still in hypothetical  
9 world here?

10 Q. We're talking about general principles of  
11 valuation.

12 A. Yes. Sorry. Thank you.

13 Q. Were you talking specifically about --

14 A. Let me respond to your question correctly. So  
15 what would one do is look at the key variables that are  
16 responsible for the uncertainty. And you first -- in  
17 your determination, depending upon which side you're on,  
18 you decide you go with an expected value for those key  
19 variables that are conservative. Then you start making  
20 changes to those values of that variable to see how it  
21 affects the valuation. That would be one way to ascribe  
22 a degree of uncertainty to a particular valuation or to a  
23 range of valuations.

24 Q. I know you're not a CPA, but are you familiar  
25 with the concept of materiality and gap?

1           A.    Well, I am. Materiality is one of those loaded  
2           phrases that means different things to different people,  
3           you know, legally, accountants, economists. So, you  
4           know, if you want to give me a definition, I will be  
5           happy to use it.

6           Q.    Well, I think there -- I am not going to  
7           purport to try to define it either. Basically, is it  
8           fair to say that the concept of materiality takes into  
9           the consideration that there is margin for error in any  
10          sort of financial reporting under gap --

11                   MR. RAMSEY:   Form.

12          Q.    -- and that sometimes that it's small enough  
13          that it doesn't really matter?

14          A.    I have a hard time agreeing with that  
15          characterization. The latter part seems to be perfectly  
16          reasonable. If something that, you know, if it's General  
17          Electric and in the market cap is billions of dollars and  
18          General Electric has a truck blow up, is that small  
19          enough not to -- if that value is small enough not to  
20          report to shareholders -- it's not material enough. I  
21          would agree with that. It's small. Whether that's  
22          because of uncertainty -- that's kind of a new concept  
23          that I have not heard.

24          Q.    Let me put it this way. So I am talking mainly  
25          in terms of let's say income numbers. So accounting can

1 oftentimes lead to -- especially when you're talking  
2 about accrual accounting and companies have things coming  
3 in after the end of the year, it's not clear where you  
4 put it, different accounting methodologies being applied  
5 to the exact same numbers can result in significant  
6 differences in terms of reported income for a company; is  
7 that fair to say?

8 A. Can you repeat that question back? That was  
9 kind of a long-winded setup. Make sure I got it all.

10 Q. I will rephrase. Is it fair to say that the  
11 choice of accounting policies by a company can affect  
12 what its reported financials say in terms of the dollar  
13 amount of income earned?

14 A. Yes.

15 Q. So if an accounting policy were to simply be  
16 changed, then the numbers would be different?

17 A. Yes.

18 Q. And in not all instances would those  
19 differences necessarily be materials to the value of the  
20 company; is that fair to say?

21 A. So there is a lot of literature -- economic  
22 literature on this particular point. And the upshot of  
23 the literature is that investigators see through  
24 accounting fiction. So if one company is using some  
25 straight-line depreciation and another company is using

1 accelerated depreciation, are those companies valued  
2 differently? No. Investors see through those kind of  
3 accounting choices that companies make, and they are able  
4 to adjust their valuations accordingly. I don't know if  
5 that answers your question. That's kind of my reaction  
6 to your point about accounting choices.

7 Q. Let's say putting aside that kind of thing. So  
8 are you familiar with the concept of how sometimes income  
9 might be taken all at once, or it might be amortized,  
10 capitalized over time or same thing with expenses, right,  
11 sometimes say there is a three-year contract, but a  
12 company gets paid all up at once. The accountants would  
13 probably say you have to report that over a three-year  
14 period, the life of the contract; fair to say?

15 A. Could be.

16 Q. So in that instance how would that -- does the  
17 choice of whether or not to record that money all up  
18 front or over time affect a valuation analysis?

19 A. Well, I mean the choice certainly has an effect  
20 on the numbers. But does it affect a valuation? Let's  
21 deal with the situation of an expense. If you have a  
22 cost that's capitalized, what you're basically saying is  
23 that the benefits from this particular expenditure are  
24 going to accrue over a number of years. And is it  
25 appropriate to reflect a fraction of that cost in a given

1 particular year, yes, because that's kind of how the  
2 economics relates to the accounting numbers.

3 Consequently, if you have a cost that is a one-time  
4 period expense, then you would reflect it in that  
5 particular year because the benefits from that particular  
6 expenditure are expected to happen in the year that those  
7 expenses are occurred and recorded as an accounting.

8 Q. Right. I actually wanted to stay away from  
9 expense because an EBITDA capitalized expense is actually  
10 taken out of the calculation, right, because it's part of  
11 amortization?

12 A. So the depreciation on the equipment?

13 Q. Yes.

14 A. Fair enough.

15 Q. I mean the --

16 A. The reason that it's done is because you've  
17 got -- you're trying to assess the cash flow. And EBITDA  
18 is probably the closest accounting number to cash flows  
19 because that's true. It doesn't account for  
20 depreciation, but it doesn't account for the offset  
21 capital expenditures. So in a simplified world where  
22 capital expenditures equals depreciation or they're  
23 similar, it is reasonable to and it is done by a lot by  
24 financial analysts and in security reports that you  
25 would use EBITDA as a closest surrogate proxy, if you

1 will, for cash flows from the accounting income  
2 statement.

3 Q. Okay. So going back to my example if a company  
4 that has a three-year contract, gets paid all upfront.  
5 Let's say the company is valued after year one.  
6 Depending on whether that company amortizes that income  
7 or records it all at once, its reported income that would  
8 be going into your valuation analysis could be very  
9 different, correct?

10 A. Well, if you're reporting income that in one  
11 year that you had not earned, then that's a mistake. And  
12 that would be a, you know, in my experience in security  
13 litigation, which is the last 30 years, that would be a  
14 big problem. And you would get sued for misrepresenting  
15 your revenue. So like I said, whether it's income,  
16 whether it's expenses, if you are reporting numbers that  
17 you shouldn't be reporting, does that make a difference,  
18 yes. And you're going to get sued for misrepresenting  
19 your income for that particular year.

20 Q. I am not trying to get into liability issues  
21 right now. Is it fair to say in accounting there are a  
22 number of gray areas in consistently evolving standards  
23 where contracts have complexities that, you know, would  
24 not be encompassed easily within a hypothetical question  
25 in a deposition?



1 MR. RAMSEY: Form.

2 A. You're asking me an accounting question?

3 Q. No. I'm asking you -- accounting answers are  
4 not always black and white; fair to say?

5 MR. RAMSEY: Form.

6 A. I suppose no answer is black and white.  
7 Accountants have problems with how they do their job just  
8 like economists do.

9 Q. So let's just assume that for the sake of this  
10 hypothetical that this income and whether it's recorded  
11 all at once or over time is within a gray area and that  
12 both would be reasonable accounting choices.

13 A. Well, that sure doesn't fit the example that  
14 you gave me about a revenue. You better come up with  
15 another example if you accept that as a hypothetical.

16 Q. Let's say that it is revenue that is connected  
17 to a vendor with whom there is a separate contractual  
18 relationship and a number of different ties with it such  
19 that there are arguably -- I am getting way ahead of  
20 myself. Let's stop this line here. Is it fair to say  
21 that if accounting decisions are made that affect the  
22 numbers that go into your equation, that effects the  
23 ultimate valuation number that gets spit out?

24 MR. RAMSEY: Form, go ahead.

25 A. I am trying to understand what that question

1 means.

2 MR. RAMSEY: Are you saying if he's  
3 providing different numbers by accounting, it's  
4 going to change his number?

5 Q. I am just saying -- yeah. If a company  
6 restates its financials, for example, after a valuation  
7 date -- ?

8 A. Uh-uh.

9 Q. -- is that going to affect the ultimate number  
10 potentially in terms of your valuation?

11 A. So would the restatement -- if I had been  
12 provided with the restated numbers at the time they  
13 incorrectly provided their profit, would that affect the  
14 valuation? Sure.

15 Q. Now in the --

16 A. It could if it's material.

17 Q. When you're valuating a company on a particular  
18 date when a transaction occurred and trying to say that  
19 the transaction say, had fair value, do you use the  
20 financial numbers as they were believed to be at the time  
21 by the participants of the transaction, or do you use the  
22 real numbers if they thought the numbers were different?

23 MR. RAMSEY: Form.

24 Q. Just to be clear, so before a restatement  
25 occurs later.

1           A.     So with regard to statement?

2           Q.     Yes.   Say you're using -- do you use the  
3           unrestated financials that are referenced at the time of  
4           the transaction or the restated financials?

5           A.     You know, that's a difficult question to answer  
6           without the facts and circumstances surrounding it.  Let  
7           me try to give you the best response I can.  It is a  
8           principal in valuation that you're not allowed to peek  
9           forward.  That has been upheld in a number of litigation  
10          cases.  So, you know, as a general matter of what you're  
11          trying to do is put yourself in the position of someone  
12          at that particular point in time that has access to all  
13          relevant information about the asset, the company is  
14          object -- subject of the valuation.  And as a general  
15          matter, it's called no peeking.  I think that's kind of a  
16          silly phrase.  That's how the courts have viewed it.  And  
17          that's how people like Shannon Pratt talk about it.  
18          Bruner talks about it.  Cornell talks about it.  You're  
19          trying to understand how someone at that particular point  
20          in time with the information available to them would have  
21          valued that particular asset company.  So if your  
22          hypothetical -- if your assumption is that they should  
23          have had that information, fine.  Like a restatement.  
24          Restatement is one of those situations where look -- this  
25          is what should have been reported.  It's not like it's

1 information that is new. It's that information that was  
2 there, but they incorrectly reported it. They  
3 fraudulently reported the information. So if the  
4 question is, well, what would the valuation had been had  
5 investors known the fraudulent information? Okay. Then  
6 you would reflect it. Then if the question is, well,  
7 what is the valuation given the information that's  
8 available to any given investor that's a willing buyer at  
9 that point in time? That's a different question.

10 Q. Right.

11 A. So that's the best way I can respond to your  
12 question is to kind of give you my full explanation.

13 Q. Right. So in this case, is it fair to say that  
14 you were looking at the valuation of Eber-Metro and  
15 Eber-Connecticut as it was understood by the people who  
16 were involved in the transaction at the time and not  
17 trying to second guess it based upon what they should  
18 have known based upon subsequent events?

19 MR. RAMSEY: Form. Go ahead.

20 A. Yes. I always try to not peek to events that  
21 happen after the valuation date. So I think you're  
22 talking about the valuation date of 2012.

23 Q. Yes.

24 A. So yes, I do. I do. You know, whether there  
25 were specific outcomes that happened after 2012, I try

1 really hard not to have that effect, you know, my opinion  
2 as to what the valuation was at 2012.

3 Q. In terms of a -- does that apply for both  
4 assets and liabilities?

5 A. Yes, as a general matter it does. You know,  
6 look, there are many circumstances in which after the  
7 valuation date -- I will give you a perfect example. I  
8 have been involved in a number of cases, appraisal  
9 actions in Delaware, involving pharmaceutical companies  
10 involving a drug that is it pending. Well, you know, the  
11 drug that is pending, you've got to take a particular  
12 view as to what that drug is going to yield in the  
13 future. And two years down the road it got FDA approval.  
14 Well, that changes the picture, but you didn't know it  
15 was going to get FDA approval at that particular point in  
16 time. So, you know, those are the kinds of things that  
17 you don't want to peek ahead and say well that was known  
18 by everybody. Yes, it was known that it would be get  
19 approval.

20 Q. So in that instance where there is the  
21 uncertainty about whether this future event will occur  
22 that would increase the likelihood of this drug going to  
23 market, was there a discount applied for the earlier  
24 uncertainty? How did that work?

25 A. Well, the cash flows where the cash flows.

1 And, you know, when we looked at cash flows that were  
2 projected by management at that particular point in time,  
3 those were the cash flows that we used, and it was a  
4 discounted cash flow analysis that I am referring to.  
5 And we used those cash flows because those were the cash  
6 flows available to management at that time and reflected  
7 what it reflected. We didn't adjust them.

8 Q. Okay. Now, this is a case where you did not  
9 have projections to rely on; is that right?

10 A. That's correct.

11 Q. Did you get any explanation as to why there  
12 were no projections provided to you?

13 A. No. I certainly got the information that there  
14 weren't. Not uncommon for small private companies. They  
15 don't spend a lot of time preparing forecasts in my  
16 experience as do large companies that have staff that do  
17 nothing but prepare budget forecasts. I don't prepare a  
18 budget forecast for my company.

19 Q. I am shocked.

20 A. It is shocking.

21 Q. So talking about liability.

22 A. Uh-huh.

23 Q. As a general matter, how is a contingent  
24 liability valued?

25 A. Well, again, you're kind of in the realm of

1       accounting here.

2               Q.     In your analysis, how do you -- if you know  
3       something is a contingent liability --

4               A.     Uh-huh.

5               Q.     -- or maybe like a disputed liability, how do  
6       you end up figuring out what number to use?

7               A.     Generally, if it's truly a contingent liability  
8       that you're waiting for some outcome, I kind of take the  
9       approach that accountants take. Is there a way to  
10      estimate first what the value is of this particular  
11      liability? Well, that's kind of generally going to be  
12      value of the lawsuit. What are they suing for and to  
13      look at that particular lawsuit and what the numbers  
14      represent. And the second piece is well, is it probable?  
15      Those two things get into the valuation. Again, the idea  
16      is to put yourself in the position of an investor at that  
17      particular point in time. If you're looking at a  
18      particular lawsuit and unpaid invoices for example, well,  
19      you've got to a particular number there. And what is the  
20      dispute? Why isn't it paid? If it's not paid because  
21      you don't have the money, then it's probable that  
22      liability exists.

23              Q.     And if it's probable, do you include the full  
24      amount of the potential liability, or do you discount it?

25              A.     It depends upon the liability, but, you know,

1       so, for example, for companies that I have been involved  
2       with where they provide their estimate of what that  
3       liability, is if there is a contention of what that  
4       liability is, and if it's listed as a contingent  
5       liability, then it's generally used -- that number is  
6       generally used in assessing the valuation of a firm.

7           Q.    In this case -- turning to Page 12 of the  
8       report. You listed a number of liabilities for  
9       Eber-Metro and Eber Wine and Liquor?

10          A.    Yes.

11          Q.    And a lot of these numbers you got them from  
12       documents that were not existent at the time of the  
13       transaction in 2012, correct?

14          A.    There were a couple that were past the  
15       transaction, but my view the numbers would have been  
16       known. It wasn't like it was hidden, but in the  
17       documentation I had, some of them were not too far away,  
18       but they did go past.

19          Q.    Did you see any documentation or evidence  
20       regarding the probability of these liabilities -- the  
21       second component that you mentioned?

22          A.    How probable they were?

23          Q.    Yes.

24          A.    I mean indirectly. I did read the complaint  
25       that Harris Beach filed. I think that's what you're



1 talking about -- the Harris Beach and Benderson  
2 Development. So these were two items that unlike a --  
3 let's say unlike a product liability lawsuit or a  
4 class-action security lawsuit, these were specific  
5 invoices that were not paid. They were owed, but not  
6 paid. I didn't see any dispute that these were  
7 legitimate invoices. My take on this is that they were  
8 amounts that were for whatever reason there wasn't enough  
9 monies to be paid, and these guys were not happy about it  
10 and sued. So in my view when I looked at this, I said  
11 these are numbers that can be estimated. They are  
12 estimated. And it is probable that it exists.

13 Q. So for the Harris Beach litigation, would it  
14 have affected your analysis that these were just invoices  
15 that were not disputed if you learned that there was a  
16 counterclaim for malpractice?

17 A. No.

18 Q. Why not? Isn't that a dispute of the invoices?

19 A. It could be. I viewed this as probable.

20 Q. And did you discuss whether this was a probable  
21 liability with anyone as part of forming that conclusion?

22 A. Well, as I said, I did discuss these  
23 liabilities with the attorneys, with Wendy and Lester.  
24 And I was satisfied that these were legitimate  
25 liabilities of the company.

1 Q. Which company?

2 A. Well, in the case of --

3 Q. Let's say Harris Beach.

4 A. Harris Beach, both Metro and Wine and Liquor.

5 Q. Okay. And how did you conclude that this was a  
6 liability of both entities? Is that typical to have two  
7 entities? You know, I am not referring to the first two  
8 lines here where you mentioned one is a guarantor. The  
9 next four lines or three lines say Metro and Wine and  
10 Liquor.

11 A. So this duck tailed into the legal world and  
12 again, as I said before, I asked specifically as a legal  
13 matter because it just gets beyond my area of expertise  
14 to determine whether or not it is an obligation  
15 specifically of Wine and Liquor or Wine and Liquor and  
16 Metro. So that was something that I relied upon --  
17 counsel.

18 Q. Okay. And this was an opinion from counsel  
19 now. Not one that had been provided at the time of the  
20 transaction?

21 A. No.

22 Q. Okay. So --

23 A. What their basis was I don't know.

24 Q. Okay. So wouldn't it be more important for  
25 your analysis to determine what the probability was

1       believed to be at the time of the transaction?

2           A.     Well, that was the question posed, yes.   You  
3       asked me if it was an opinion that they provided to me  
4       now, or if it was an opinion they provided in 2012.   It  
5       was an opinion provided now but related to what was in  
6       existence in 2012.

7           Q.     Okay.   So you asked them legally which entities  
8       were on the hook for this; is that right?

9           A.     That's correct.

10          Q.     Did you ask anyone what management believed the  
11       probabilities were in terms of the entities being on the  
12       hook at that time on in 2012?

13          A.     I don't know if I couched the question in that  
14       way.   But I certainly did talk to Wendy and maybe just  
15       Wendy at that particular instance about these  
16       liabilities.

17          Q.     And what did she tell you about that?

18          A.     That these were real liabilities that the  
19       company had.

20          Q.     Which company?

21          A.     Well, again, for Harris Beach it was Metro Wine  
22       and Liquor.

23          Q.     Right.

24          A.     For Benderson it was wine and liquor.

25          Q.     Now, you cite a number of documents here.   You

1 read the Liebman report. You know that in his view none  
2 of those documents indicate any liability from Eber-Metro  
3 for the three times in the middle there.

4 A. Three times in the middle.

5 Q. Pension plan determination, Teamsters and the  
6 Harris Beach. Do you see anything different in those  
7 documents that indicate liability by Eber-Metro?

8 MR. RAMSEY: Object to form. That's really  
9 a legal question.

10 MR. BROOK: He cited these documents.

11 MR. RAMSEY: He also said he's relied on  
12 what was going to be a legal obligation. Go ahead  
13 with that objection, if you can answer.

14 A. I lost track of the question.

15 Q. Sure. Where you cited the reference documents,  
16 were you just citing that for the amount that you listed  
17 there and not for the obligor?

18 A. The citations are principally for the amount.  
19 So I can put some numbers down and do the quantification.  
20 But, you know, I do have some experience with pension  
21 obligations. I worked for the PBGC on a number of cases.  
22 So I have an understanding from an economic perspective  
23 of how investors perceive the liabilities owed to the  
24 PBGC or how the PBGC handles these things. And  
25 consequently I have a fairly good understanding of how

1 investors would account for these kind of obligations. So  
2 that -- and in fact, one of the courses I teach on merges  
3 and acquisitions take in account hidden liabilities. One  
4 has to do with pension obligations and how that affects  
5 the buyer's decision to move forward. So there is, you  
6 know, that layered on top of the legal determination is  
7 my experience and my understanding of how investors treat  
8 pension obligations.

9 Q. In this case, just so we're clear on  
10 everything, in this case the investor is also management  
11 of the company, right? So is it fair to say that --  
12 would you agree with that statement here?

13 A. No. I mean, take a look at that first page of  
14 what I discussed in terms of what I am trying to  
15 accomplish here. The amount in which the property would  
16 change hands between the willing seller and buyer when  
17 neither is acting under compulsion and when both have  
18 reasonable knowledge of the relevant facts. So that's  
19 what I am trying to -- I know it's a bit esoteric, but  
20 that's kind of the general approach that I am trying to  
21 take here.

22 Q. But you understand that overall your opinion  
23 will be used to argue that the transfer of Eber-Metro to  
24 Alexbay was a transfer that was done for fair value; is  
25 that correct?

1           A.    A transfer done for fair value. I am not sure  
2           I can agree with that. It's a transfer that was done  
3           consistent with the valuation I performed. I am  
4           valuing -- specifically valuing the entity,  
5           Eber-Connecticut. And in my opinion when you go up the  
6           chain, it yields a conclusion that the solvency -- that  
7           Eber-Metro and Eber Wine and Liquor are not solvent. So  
8           I am -- and yes, that supports the transaction, but I am  
9           not if you can find an opinion where I am opining on the  
10          transaction's fairness, I don't.

11          Q.    Well, you picked the valuation date that you  
12          did because that was when the transaction was deemed  
13          commercially reasonable by a court, correct?

14          A.    I didn't pick the valuation date. I was asked  
15          to perform a valuation as of that particular date.

16          Q.    Understood. And your primary task though was  
17          to value Eber-Metro, not Eber-Connecticut?

18                   MR. RAMSEY:   Form.

19          A.    Well, if you read my report, I specifically say  
20          that Eber-Connecticut is the only operating asset of  
21          Eber-Metro and Eber Wine and Liquor. So ultimately what  
22          I am valuing is the Eber-Connecticut valuation. From  
23          that valuation I subtract the liabilities for Eber-Metro  
24          and Eber Wine and Liquor. But I am not -- the only  
25          valuation I am doing of Eber Wine and Liquor is

1       predicated on my valuation of Connecticut.

2           Q.     Right. I am just looking at your report  
3     Paragraph 1. I have been asked to provide an opinion  
4     regarding the market value of equity of the capital stock  
5     of Eber Brothers Wine and Liquor Metro, Inc. as of May  
6     23, 2012.

7           A.     Right.

8           Q.     But in your view, the work you were focused on  
9     was just the Eber-Connecticut asset; is that right?

10          A.     If you go further, I think I actually state  
11     this.

12          Q.     I don't think there is a dispute here. I am  
13     going to you know, I guess, what I am trying to  
14     understand a little better, you know, if you're really  
15     saying you were focused on Eber-Connecticut, then that  
16     would make sense as to why you did not spend much of your  
17     report analyzing the liabilities involved here.

18          A.     If you look at Paragraph 4, that puts my  
19     analysis in perspective. So it builds up from that  
20     valuation. That's the valuation.

21          Q.     Right.

22          A.     There is no operating asset at Metro. There is  
23     no operating asset at Wine and Liquor. The only  
24     operating asset is their ownership of Eber-Connecticut.  
25     So all the valuation work I did revolved around

1 Eber-Connecticut.

2 Q. Right. And then -- but you also valued  
3 Eber-Metro and Eber Wine and Liquor to the extent that  
4 you said it was they were insolvent no matter what the  
5 value of Eber-Connecticut was, right?

6 MR. RAMSEY: Form.

7 A. I wouldn't say it that way.

8 Q. No matter which valuation of yours you used for  
9 Eber-Connecticut, right?

10 A. My opinion is that the value of  
11 Eber-Connecticut was plus any other assets of Metro and  
12 Wine and Liquor were less than the liabilities.

13 Q. And do you understand why it is that I am  
14 drawing a distinction between Eber-Metro and Eber  
15 Brothers Wine and Liquor for the liabilities?

16 A. You know, I have a vague understanding that  
17 it's some kind of legal machination that's going on here.  
18 From my perspective as an economist, what I am looking at  
19 is what I think is relevant is what the heck is the value  
20 to these ultimate -- the beneficiaries of this trust.  
21 And in order to do that, you've got to go up the chain of  
22 command. Now, I understand there is some reason why it's  
23 important to assess Metro vis-à-vis Wine and Liquor. I  
24 don't pretend to understand that. It doesn't make  
25 economic sense to me. If it doesn't make economic sense,



1       then it must be some kind of legal stuff that's going on  
2       here that allows you to put a wedge between Wine and  
3       Liquor -- put a wedge between Wine and Liquor that  
4       ultimately puts a wedge between what the beneficiaries of  
5       the trust really own.

6           Q.    Right.  I think -- let me help you put it in  
7       perspective here.  So maybe we can have a more productive  
8       discussion.  So Lester Eber foreclosed on debt that was  
9       owned by Eber-Metro and guaranteed by Eber Wine and  
10      Liquor.  And the company agreed to just give him  
11      Eber-Metro.  And eliminate the debt to Eber-Metro too, as  
12      a result.  So there is a legal question certainly as to  
13      whether that was done for fair value.  Did Lester Eber,  
14      given his fiduciary obligations and his various roles,  
15      get more value by acquiring Eber-Metro through the amount  
16      of his loans?  And so that's why drawing this line here  
17      is fairly significant.  And do you understand at least  
18      the general fact patterns as I described it?

19           MR. RAMSEY:  Form.  Go ahead.

20           A.    I am trying.

21           Q.    So would you agree that if Eber-Metro did not  
22      have all of the liabilities for the pension and Harris  
23      Beach that you mentioned on this chart here, then the  
24      value of Eber-Metro would have been significantly higher  
25      than the 3.8 million dollars in debt that you listed here

1       that was owed to Lester Eber?

2                       MR. RAMSEY:   Form.   Go ahead.

3               A.    When you say, "did not have", what do you mean  
4   by that?

5               Q.    Equal that it was not legally -- at the time of  
6   the transaction it was believed that Eber-Metro would not  
7   be liable for any of those debts.

8               A.    So --

9                       MR. CALIHAN:  Objection.

10              Q.    Let me sort of give you my take on this.  And I  
11   mentioned to you before in one of your questions my  
12   experience.  And again, putting myself in the position of  
13   willing buyer with knowledge of all the relevant facts.  
14   I know from experience that when you try -- when you try  
15   to play a shell game with a PBGC about who was the  
16   controlling entity and who owns what and where does this  
17   liability set, you run an awful risk.  I have seen it  
18   firsthand.  I worked in the case called White  
19   Consolidate.  That is not unlike this where the company  
20   itself tried to say this is not -- the pension is not our  
21   liability.  It belongs to -- and they sold the company  
22   and without the liabilities.  And did not have enough  
23   money to pay those liabilities.  And said, well PBGC, you  
24   pick up the rest.  And the PBGC said nuts to you.  We're  
25   going after you.  This is fraudulent conveyance.  Now,

1       that kind of knowledge is the kind of thing that any  
2       individual investor would reflect. So you can tell me  
3       well, you know, legally I've got a legal opinion that  
4       says this these pension obligations don't -- have nothing  
5       to do with Eber-Metro. And I can -- I feel fairly  
6       confident that had they sold Eber-Metro and the proceeds  
7       were not enough to cover the amount of that pension,  
8       either the PBGC is going to say you can't do this  
9       transaction or in the case that I have seen, they go  
10      after the buyer. And say well, now you bought this.  
11      Those liabilities are now on your books and you have more  
12      assets than what you just bought because you merged with  
13      Connecticut. So now you're on the hook to pay those.  
14      And, you know, again, these kinds of quote hidden  
15      liabilities are the kind of things that are affected in  
16      the ultimate purchase price even if one is -- if a  
17      purchase price is offered because they're going -- a  
18      buyer is going to price protect themselves. They're not  
19      going to sit there and say, I got this great legal  
20      opinion that is not going to be a problem. I can  
21      separate the assets from this pension liability.

22           Q. But what if it actually happened in this case?

23           A. What if what actually happened?

24           Q. What if the buyer in this case, Alexbay because  
25      it bought it by giving up debt, actually believed that by

1       engaging in this transaction it would acquire Eber-Metro  
2       free and clear of pension obligations, would that be  
3       relevant to your analysis?

4               MR. RAMSEY:   Form.   Go ahead.

5               A.    No. Again, if you go back to that paragraph, I  
6       am talking about a willing buyer aware of the facts. You  
7       seem to be focused on what is kind of referred to as  
8       specific investigators valuation as opposed to a fair  
9       market value. Again, we seem to be flipping over into  
10      the process as to why something was done and was it done  
11      for legitimate reasons. I am out of that. That's not my  
12      right here.

13              Q.    You have not made any opinion on whether in  
14      this case because Lester Eber was a judiciary, his  
15      opinion of the valuation would be relevant to this  
16      litigation?

17              MR. RAMSEY:   Form.

18              A.    I don't know what the judge is going to  
19      consider relevant or not relevant. I am telling you what  
20      is relevant to my valuation is what I have done in this  
21      report. You know, whether Lester thought that he could  
22      skate on the PBGC, that's Lester's view. I am telling  
23      you as a measure of fair market value under the  
24      definition that I provided here an investor is going to  
25      take into account those obligations for sure.

1 Q. Are you sure that was the case in 2012? There  
2 has been a number of elements of the law recently.

3 A. My involvement going back before 2012 -- I mean  
4 look, I didn't -- I don't see anything that would  
5 contradict that. The PBGC, as far as I can see, fight  
6 like a dog when you try to hide, you know, or skirt and  
7 force the PBGC to pay for or to be the trustee for  
8 pension obligations. You know, you're in for a fight. I  
9 guarantee that.

10 Q. To what extent in connection with your work in  
11 this case did you become familiar with the fight that  
12 erupted between PBGC and the Eber entities?

13 A. Well, you know, I familiarized myself with some  
14 of the analysis that the PBGC did. And I think there was  
15 a document that I saw that provided some kind of -- I  
16 don't know. I guess call it a settlement of some kind.  
17 I don't know if that's the right legal term. I read  
18 those things.

19 Q. For this chart, the summary of liabilities, did  
20 you consider whether there was other obligors beyond  
21 Eber-Metro and Eber Wine and Liquor for any of these  
22 debts?

23 MR. RAMSEY: Form.

24 A. No. I don't specifically recall that.

25 Q. Would that affect your analysis of the

1 liabilities if there was a third obligor?

2 MR. RAMSEY: Form.

3 A. Possibly.

4 Q. So are you aware of that after the Alexbay  
5 transfer PBGC put a lien on Eber-Metro?

6 A. Yes.

7 Q. Are you aware that at the same time PBGC put a  
8 lien on Eber-Connecticut?

9 A. Yes. I think that is consistent with my view  
10 of how the PBGC operates. They take fraudulent  
11 conveyance very seriously. If they think you're trying  
12 to escape, they're going to certainly at least do that.

13 Q. So is it fair to say then that in addition to  
14 Eber-Metro and Eber Wine and Liquor in your opinion  
15 Eber-Connecticut was also an obligor for pension  
16 liability?

17 MR. RAMSEY: Form.

18 A. Certainly from an investor's perspective that's  
19 exactly what they are going to expect to happen.

20 Q. Does it affect your ultimate valuation analysis  
21 as to whether you put that liability in the  
22 Eber-Connecticut analysis or further up the chain?

23 A. So if the liabilities are at the  
24 Eber-Connecticut level, that would reduce valuation for  
25 Eber-Connecticut by the pension.

1           Q.    Okay.  But you did not do an analysis with  
2           running the numbers in that way; is that right?

3           A.    No.

4           Q.    Do you think that you perhaps should have?

5                   MR. RAMSEY:  Form.

6           A.    Well, I don't think -- it doesn't matter.  So I  
7           didn't -- it's kind of like a -- what is the point?  The  
8           solvency opinion has to do with Eber-Metro and Eber Wine  
9           and Liquor.  For I mean -- this gets back to what I said  
10          before about the economics of it.  I am still a little  
11          fuzzy about why the hell it matters between Eber Wine and  
12          Liquor and Eber-Metro.  But notwithstanding, to me it  
13          didn't really matter whether I put the liabilities of  
14          Connecticut as long as they are there with Eber-Metro  
15          when I am doing a solvency analysis of Eber-Metro that's  
16          what counts.  So it's like what's the point.

17          Q.    So would you include the liabilities at each  
18          level for the balance sheet of all three companies?

19          A.    If the total liability is at Eber-Connecticut,  
20          then I've accounted for the liability relative to  
21          Eber-Metro.  I netted it out against the Eber-Connecticut  
22          assets.

23          Q.    How do you decide where that goes?

24          A.    As I said, it's difference.  Not a distinction.  
25          It doesn't matter to me.  It's an economic matter.  You

1 know, what is the point to make more paper? To say well  
2 if it's Eber-Connecticut then Eber-Connecticut value is  
3 lower, but then it's the same flip side that Eber-Metro  
4 has less operating assets. I am not sure I understand.  
5 I know it must make such kind of legal difference, but  
6 from my perspective, I just don't see what the point  
7 would be to do that analysis.

8 Q. We were talking about PBGC. What about the  
9 Teamsters liability? What is your basis for believing  
10 that is something -- that a reasonable investor would  
11 attribute to Eber-Metro?

12 A. Same basis. I think -- I know that there was a  
13 lawsuit over payment of the Harris Beach amount. And  
14 they sued for fraudulent conveyance.

15 Q. Do you know the timing of those lawsuits?

16 A. That would have been a post-valuation date.

17 Q. Right.

18 A. But my point is that from an investor's  
19 perspective, it's like day follows night. You start  
20 playing around with pension obligations whether it's the  
21 PBGC insured and pension from Teamsters, you are going to  
22 price protect yourself. And I think the same holds true  
23 with the other obligations as well.

24 Q. If a liability is contingent upon a creditor  
25 successfully pursuing a fraudulent conveyance lawsuit, is



1       it really in your opinion appropriate to include that as  
2       probable contingent liability?

3           A.     That's not what I said.

4           Q.     For Harris --

5           A.     I said that day follows night. If you tried to  
6       separate the liabilities from the operating assets,  
7       you're going to get fraudulent conveyance. An investor  
8       is going to certainly reflect that. They will not say,  
9       "I will roll the dice on this." No. These are serious  
10      obligations. Particularly the PBGC and I would also  
11      include the Teamsters in that. And the only point I  
12      raise about the Harris Beach is that look, that's exactly  
13      what an investor is going to anticipate. You try to hide  
14      liabilities from the assets, and this is what you're  
15      going to get. An investor knows that. You just can't  
16      ignore that. You can't put blinders on and say this  
17      doesn't matter. Yes, it matters. It matters a lot.  
18      Particularly with a company for which the assets are less  
19      than the liabilities, it matters a whole hell of a lot.

20           MR. RAMSEY: Take another five, Brian.

21           (Whereupon, Exhibit Number 130 was marked for  
22      identification at this time.)

23           Q.     Let's do one more document for now. So for the  
24      record, I am showing you what's been previously marked as  
25      Exhibit 73 and newly marked Exhibit 130. Have you seen

1       either of these documents before today?

2           A.    Let me read it.  I think I have seen  
3       Exhibit 74 before.  It looks familiar.  I am not sure I  
4       recollect 130.

5           Q.    So looking at Exhibit 74 then, you see it is a  
6       confession of judgment signed by Wendy Eber on behalf of  
7       the Eber Brothers Wine and Liquor Corp.  And that's as to  
8       the Teamsters liability?

9           A.    Right.

10          Q.    And that number matches within five cents the  
11       number you've got in your summary of liabilities, right?

12          A.    Yes.

13          Q.    Do you see that this confession of judgment  
14       only as to Eber Brothers Wine and Liquor Corp and not  
15       Eber-Metro?

16          A.    So I think you're referring to the heading in  
17       there that says the defendant is Eber Wine and Liquor  
18       corporation.

19          Q.    Yes.

20          A.    Yes.  It says Eber Wine and Liquor Corporation.  
21       It does not say Eber-Metro.

22          Q.    Then looking at 130.  That's the exhibit in  
23       front of you.  Wendy Eber is explaining the reason for  
24       that.  She says in the last paragraph, "I had modified  
25       the confession of judgment to reflect that it is against

1 Eber Brothers Wine and Liquor Corporation and not the  
2 Eber companies." Do you see that?

3 A. I see that.

4 Q. So is it your opinion that these documents  
5 reflecting that the liability was only against  
6 Eber Brothers Wine and Liquor Corp does not change your  
7 assessment that that liability belonged to Eber-Metro?

8 MR. RAMSEY: Form, legal opinion.

9 MR. CALIHAN: Objection to form.

10 A. Yeah. You keep saying belonged to. I am  
11 saying that an investor is going to take that into  
12 account. They are not going to put little compartments  
13 and say this is not the obligation of Metro. You know,  
14 what this says, it says. It doesn't alter my opinion as  
15 to how an investor is going to look at these kind of  
16 obligations.

17 Q. And by these kind of obligations, do you mean  
18 pension obligations specifically, or any debt belonging  
19 to the parent company that is transferring its  
20 subsidiary?

21 A. Most certainly it's going to reflect the  
22 pension, both the PBGC as well as the Teamsters, but yes.  
23 Clearly for a company that -- I say the company -- for  
24 the situation where the assets of Metro are such that  
25 obligations, even if you consider them up the line, can't

1 be covered, yes. It will. They just -- it just can't be  
2 ignored.

3 Q. Because of the likelihood of fraudulent  
4 conveyance?

5 A. That is a distinct possibility. Like I said, I  
6 think that any time you have a situation where you're  
7 selling assets and you're receiving a price that is less  
8 than the liabilities, that is exactly what you're going  
9 to encounter and an investor is going to know that.

10 Q. So focusing on Harris Beach, that's not a  
11 pension obligation. Does it change your conclusions in  
12 any way that at the time of the Alexbay transfer in 2012  
13 the only party being sued by Harris Beach and that owed  
14 money to Harris Beach according to its engagement  
15 agreement was Eber Brothers Wine and Liquor?

16 MR. RAMSEY: Form. I will make the same  
17 objection. I think you're looking for a legal  
18 conclusion here.

19 A. Yeah. I mean -- look, I know that they did sue  
20 all the entities at some point for payment.

21 Q. I do want to be clear. I am not looking for a  
22 legal conclusion because your valuation is not based upon  
23 what the actual law was, right? What the actual  
24 liabilities were as determined by later courts, correct?

25 A. Fair enough.

1           Q.    Just as if you're doing a valuation based upon  
2           what people knew at the time, they wouldn't be based upon  
3           what restated numbers were a year later, correct?

4           A.    Fair enough.

5           Q.    So in this instance, why isn't the  
6           determination of what the liabilities of Eber-Metro were  
7           something that should be based on what the understanding  
8           was at the time of management and the purchaser of what  
9           the liabilities of what Eber-Metro would be?

10           MR. RAMSEY:   Form.

11           A.    Because I am trying to understand how an  
12           investor, a willing buyer, is going to view this company.  
13           That is my analysis. I mean, I don't know how else to  
14           say that. I've said it five times now. And you keep  
15           trying to say, "Well, don't you want to value it the way  
16           that Wendy valued it?" No. That's not my task here. I  
17           mean, she did what she did. She wrote what she wrote.  
18           Her view is what it is. I am telling you how I am doing  
19           the valuation.

20           Q.    And I am just -- I am not trying to be obtuse  
21           here. I'm trying to get a clear record. So the  
22           reasonable investor in your view would conclude that  
23           Eber-Metro would still be on the hook because upon  
24           transfer, Eber Wine and Liquor was left with insufficient  
25           assets to meet its debt; is that fair to say?

1 A. You're talking about all the items?

2 Q. Yes.

3 A. So number one, there is the legal determination  
4 that I said before.

5 Q. Right.

6 A. That I have been given. Number two, it makes  
7 absolutely sense to me from an economic perspective.  
8 That any investor is going to price protect themselves,  
9 particularly for a company that's in financial distress.  
10 And that I think there is no dispute. Certainly without  
11 question even Eber-Metro is in financial distress. And  
12 when you are a company in financial distress and you've  
13 got liabilities attached to those assets, boy, oh boy,  
14 you know, you just can't ignore that. And that's my  
15 opinion. That investor would not ignore that. And would  
16 not put it in compartments notwithstanding what Wendy  
17 thinks. It's interesting, but it doesn't affect my  
18 opinion.

19 Q. Okay. Let's take that break.

20 (Whereupon, there is a short recess in the  
21 proceedings.)

22 Q. Okay. So going to your report in general, you  
23 did five valuation analyses for Eber-Connecticut; is that  
24 correct?

25 A. Yes.

1           Q.    But you did not offer an opinion on which of  
2           those valuation is most reliable or some combination of  
3           them to arrive at a final number, did you?

4           A.    No.  I provided a range of values from each of  
5           those five.  The range of values results from each of  
6           those five measurements.

7           Q.    Why didn't you offer an opinion on what the  
8           correct value should have been?

9           A.    Well, in my view, the range that I developed  
10          and applied told me that this was an insolvent company.

11          Q.    Not Eber-Connecticut though?

12          A.    No.  Up the chain, yes.

13          Q.    Right.  But as we have been suggesting, there  
14          are potential questions as to whether or not the numbers  
15          for the debt are correct or legally relevant or something  
16          like that.

17                   MR. RAMSEY:  Form.

18          Q.    So in that instance, wouldn't it be important  
19          about to what the value of Eber-Connecticut is if the  
20          value would determine whether or not it was solvent --  
21          the parent companies were solvent?

22          A.    You mean a point estimate?

23          Q.    Yes.

24          A.    Well, if you want a point estimate.  Just take  
25          the midpoint, that's fine.

1 Q. Why is that appropriate?

2 A. There are five measures of value. Each of them  
3 has problems. But these are the kinds of things -- not  
4 with understanding problems -- these are the kind of  
5 thing that investors are going to look at in formulating  
6 their opinion. If you're so inclined to only want to  
7 point an estimate, I mean, you know, in my view a  
8 reasonable range is more informative. I think it  
9 provides more information.

10 Q. Do you think --

11 MR. RAMSEY: Go ahead, finish your answer.

12 A. I think a reasonable range provides more  
13 information. It is un essence the sensitivity analysis  
14 or effective sensitivity analysis of what you were  
15 referring to earlier about well, is there uncertainly  
16 with numbers. Well, the more numbers you have, the more  
17 certain you are about what ultimately that range of value  
18 is.

19 Q. Do you consider all five methods to be equally  
20 reliable?

21 A. You know, so first I would say that these  
22 measurements are things that an investor would look at.  
23 Each of these methods has problems perhaps multiple  
24 problems. I think if you start with the offers or the  
25 transactions. So start with the Eder-Goodman



1 transaction. That has a significant problem because of  
2 the substantial rights. I've got two pages in my report  
3 talking about the substantial rights. Now, I try to do a  
4 conservative estimate as to what those rights are to come  
5 up with some value. But, look, for a company in  
6 financial distress in particular, the preferred stock  
7 aspect of it is going to be huge -- absolutely huge. So  
8 is that a problem? Yeah. I mean you try to adjust away  
9 from it. That is a problem. You know, that is one of  
10 those things that make that valuation uncertain.  
11 Southern offer to a lesser extent -- the Southern offer  
12 also has this right of first refusal that causes one to  
13 do again an adjusted valuation of the Southern offer.

14 Q. And the Southern offer wasn't actually  
15 accepted?

16 A. Look, you know, the Southern offer wasn't  
17 accepted, but I view that as a bona fide offer. And a  
18 bona fide offer is a reasonable thing to use in the  
19 analysis. So I wouldn't -- I am not going to discount it  
20 because it wasn't an actual transaction. I think it's  
21 still relevant.

22 Q. Can you please explain what you mean by bona  
23 fide offer?

24 A. Well, there were something -- I think it was  
25 like 14 amendments. It was far along. There was a lot

1 of paperwork involved -- due diligence.

2 Q. I mean in general what a bona fide offer is?  
3 Like how does something constitute that?

4 MR. RAMSEY: Form.

5 A. I draw a distinction between, you know, saying  
6 I have, you know, a preliminary offer of interest. That  
7 I wouldn't consider a bona fide offer. But if you've got  
8 a substantial amount of paperwork behind an offer with a  
9 lot of conditions and things that have been formulated,  
10 that to me is a bona fide offer. That's what I view  
11 anyway.

12 Q. Is a --

13 A. You want me to finish my answer? I was not  
14 done. So we can go back to any one you want to. So with  
15 regard to the Pole-Bridge Bowman offer, that to me has  
16 problems too. It's a transaction that I am not 100  
17 percent comfortable with that being the measure of value.  
18 I don't know that I would -- I think that has problems as  
19 well.

20 Q. Why aren't you comfortable with it?

21 A. Well, I am concerned that it could possibly not  
22 be an arm-lengths transaction. I can't make a  
23 determination one way or the other, but it causes me  
24 concern.

25 Q. Why -- just to follow up on that, what about it

1 does not appear to be arm's-length?

2 MR. RAMSEY: Form.

3 A. I was concerned that the company was  
4 repurchased at the same price. It could be -- there  
5 could be explanations why that occurred, but the fact of  
6 that doesn't sound right to me.

7 Q. I am sorry. What do you mean by that?

8 A. It was unwound.

9 Q. Okay. The terms of the exercising how Wendy  
10 Eber ended up acquiring it?

11 A. Yes. I didn't see anything contemporaneous to  
12 the transaction itself that could indicate this. The  
13 ultimate unwinding caused me a little bit of questioning  
14 whether the transaction was a pristine transaction. And  
15 also problem -- the other problem I had with that is that  
16 there was a right of first refusal in that offer. So you  
17 have to adjust that. Now with regard to the farmers --

18 Q. I just want to stay on that one for a second,  
19 then we will jump to the other just so the transcript  
20 is -- in forming your opinion, were you aware of who were  
21 the owners of Pole-Bridge Bowman and Partners?

22 A. I know that it was a gentleman named Steurm was  
23 the principal.

24 Q. And what is your understanding of what his  
25 relationship was to the Ebers?

1           A.    He was the consultant. My understanding he was  
2           a consultant. Maybe the term is workout consultant for  
3           companies in financial distress to get to them to work  
4           out of their distress. And I think he was a lawyer.

5           Q.    And are you aware that the Ebers have said that  
6           he was their lawyer?

7                       MR. RAMSEY:   Form.

8           A.    I know he was their consultant. I don't know  
9           that he gave legal opinions.

10          Q.    Would it affect your assessment of whether this  
11          was an arm-length transaction if you found out that Glenn  
12          Steurm had an attorney/client relationship with the Ebers  
13          individually or with one of their companies?

14          A.    No, I don't think so. I am not sure why that  
15          would affect my view of things whether he is providing  
16          consulting services or legal services. I am not sure  
17          that matters.

18          Q.    Is a fiduciary relationship an arm-length  
19          relationship in your opinion?

20                       MR. RAMSEY:   Form.

21          A.    Is a fiduciary relationship an arm's-length  
22          relationship? I am not sure what you mean by that.

23          Q.    Do you understand the term fiduciary  
24          relationship?

25          A.    The transaction -- because he is a fiduciary

1       that the transaction would not be arm's-length.

2           Q.    I am asking if the fact that there is a  
3       fiduciary relationship between two individuals prevents  
4       that transaction for being characterized as an  
5       arm's-length transaction?

6           MR. RAMSEY:   Form.

7           A.    I would think it would be just the opposite.  I  
8       think the fiduciary would have an obligation to make sure  
9       that whatever transaction took place was a fair market  
10      value unless I am missing something.  You seem to have a  
11      different --

12           MR. RAMSEY:  I think we're in the legal  
13      realm here.

14           Q.    So the term arm-length, is that fair to say  
15      that is a term that is important to your valuation work?

16           A.    Well, it is a shortcut to Page 1 of my report  
17      that talks about a willing buying and willing seller with  
18      knowledge of all relevant facts and no compulsion to buy  
19      or compulsion to sell.  And so those are the things that  
20      in my view constitute an arm's-length transaction.

21           Q.    So let me pose to you the hypothetical.  If the  
22      transaction was entered into between a lawyer and his  
23      client to acquire an equity interest in a company and the  
24      lawyer did not actually want to buy that interest, but it  
25      was done for structural your purposes to benefit the

1 client, would you consider that to be an arm's-length  
2 transaction?

3 MR. RAMSEY: Form.

4 A. Structural purposes to -- that's way beyond --  
5 I mean I don't know how to answer that question.  
6 Structural purposes to benefit --

7 Q. One simple thing. I will rephrase. If a  
8 person -- you refer to as a will buyer?

9 A. Yes.

10 Q. What did the buyer actually did not have any  
11 economic interest in acquiring the equity and he did it  
12 solely to fulfill his legal obligation to a client.

13 MR. RAMSEY: Form.

14 Q. Could you rely on that transaction to determine  
15 the value of the equity?

16 A. You're saying a fiduciary would have a legal  
17 obligation.

18 Q. I am not saying necessarily as a fiduciary. I  
19 am talking about a particular circumstance where a lawyer  
20 decides -- a lawyer specifically says, "I do not want to  
21 buy this, but I will do so if I have to. So that the  
22 sale can go through."

23 MR. RAMSEY: Form.

24 Q. Is that just impossible to believe?

25 A. It's a little hard to believe.

1 Q. I will show you a document.

2 A. Okay.

3 Q. All right. I will read for you a memo from  
4 Glenn Steurm, the owner of Pole-Bridge Bowman.

5 A. Uh-huh.

6 Q. To Pat Dalton, a lawyer for Wendy and Lester  
7 Eber and copying Wendy and Lester Eber dated May 26,  
8 2010. That is I think two days before -- two to four days  
9 before the effective date of the Pole-Bridge Bowman  
10 transaction?

11 A. Okay.

12 Q. This memo states, "The current proposal is for  
13 a single-member LLC New-co to acquire the interest and  
14 that I be the only equity holder of the new LLC. Here  
15 are the terms that we discussed. One, New-co purchases a  
16 six percent equity interest in Connecticut for a secured  
17 non-recourse note in the amount of blank dollars. Wendy  
18 Eber has an exclusive right of first refusal to purchase  
19 the entire equity interest from New-co. If Ms. Eber  
20 does not exercise her right, then Metro has the next  
21 right of first refusal to purchase the entire equity  
22 interest. If Metro does not exercise its right, then  
23 Eder-Goodman has the final right of first refusal to  
24 purchase the stock. If neither Ms. Eber, Metro or  
25 Eder-Goodman elects their right, then New-co will be

1 required to retain its interest. The Ms. Eber will have  
2 a proxy to vote the equity interest held by New-co and a  
3 limited Power of Attorney. I have no pride of authorship  
4 in this outline. If we can find a different structure  
5 that works that would be better for me. Based on that  
6 memo, does that sound like a transaction that was  
7 negotiated at arm's-length?

8 MR. RAMSEY: Form.

9 A. I am trying to understand. How these items  
10 that you listed to me indicated that it's not arm-length.

11 Q. Those items actually aren't. I was mostly  
12 doing that because you don't have the document in front  
13 of you and I want to be fully transparent and read  
14 everything. I think the point I want to focus on is that  
15 you said -- I actually left out the first line. That's  
16 really important. Pat, as we discussed this morning, we  
17 need to identify an alternative purchaser of the six  
18 percent interest the Connecticut, LLC. The current  
19 proposal is for a single-member LLC. New-co to acquire  
20 the interest and that I be the only equity holder of the  
21 LLC. And then at the end he says if we can find a  
22 different structure that works that would be better for  
23 me.

24 A. So read that first sentence again?

25 Q. As we discussed this morning, we need to



1 identify at an alternative purchaser of the six percent  
2 interest in the Connecticut, LLC.

3 MR. RAMSEY: And what is the question.

4 Q. So the question is, based on the fact that  
5 Glenn Steurm is saying Wendy and Lester Eber and their  
6 lawyer -- that he does not want to actually buy the six  
7 percent, does that sound like an arm's-length transaction  
8 to you?

9 MR. RAMSEY: Form. I am not sure that's an  
10 accurate interpretation.

11 A. I am -- you're asking me to interpret this  
12 letter to mean that he does not want to buy this?

13 Q. I am asking you if someone were to conclude --  
14 so this is a hypothetical now. If someone were to  
15 conclude that Glenn Steurm did not actually have an  
16 economic interest in purchasing the six percent equity  
17 that was sold to Pole-Bridge Bowman and Partners, would  
18 that affect your opinion of whether that was an  
19 arm's-length transaction?

20 A. It could. If there is no economic interest --

21 MR. RAMSEY: You've answered it. It could.

22 A. It could.

23 Q. Have you ever heard of a round-trip  
24 transaction?

25 A. Well, I know a round-trip transaction with

1       regard to a security. You buy and then you sell it.

2           Q.    Are you familiar with a round-trip transaction  
3       in which it creates an appearance of economic substance,  
4       but in fact because money is going both ways there is no  
5       real economic substance to it?

6           A.    Yes. I've actually offered opinions on this  
7       for the Department of Justice.

8           Q.    And in the case of the Pole-Bridge Bowman  
9       transaction, it was funded by the note for the same  
10      purchase price. Do you see any similarities between that  
11      and a round-trip transaction?

12               MR. RAMSEY:   Form.

13           A.    I mean note in lieu of cash. I mean it's a  
14      still an asset on the balance sheet for the company. So  
15      I am not sure what you mean. That only cash counts?

16           Q.    No. I am just saying if someone supposedly  
17      purchases equity in a company, but they receive the money  
18      to do that from the company itself such as a company  
19      receives no cash.

20               MR. RAMSEY:   Form.

21           Q.    Does that affect?

22           A.    If the asset has value whether it's cash or  
23      not, it shouldn't matter.

24           Q.    Well, okay.

25           A.    If the buyer is providing a note saying, "I owe

1       you this money." There is a note. That's my obligation  
2       to you in lieu of giving cash. You seem to be drawing a  
3       distinction between the value of a note and the value of  
4       cash. Is that what you're saying?

5           Q. I am not necessarily drawing a distinction  
6       there. What I am saying is, you know, let's step back  
7       for a minute. For what reasons does a company -- a  
8       privately held company generally sell equity in a company  
9       that it holds?

10          A. You mean like a secondary offering?

11          Q. A secondary offering or where like in this case  
12       where Eber-Metro sold some of the interest it held in  
13       Eber-Connecticut?

14          A. Well, for a secondary offering they generally  
15       are trying to sell new shares to investors too, you know,  
16       for a variety of reasons. But, for example, make a  
17       capital investment of some kind. Selling shares, selling  
18       existing shares held by some other entity. You know,  
19       selling existing shares doesn't raise any new capital per  
20       se. Other than that, I don't know how to answer your  
21       question as a general matter.

22          Q. Did you review the critique of this  
23       transactions economic substance from Glenn Liebman?

24          A. Yes. My recollection is that he also had  
25       issues with regard to whether this was arm's-length.

1 Q. Right. And one of the things he pointed out  
2 was the interest rate on the note was only two percent  
3 when the company was at the time borrowing money from  
4 Lester Eber at 12.5 percent. Does that make sense to  
5 you?

6 MR. RAMSEY: Form.

7 A. You know, I have a hard time with that. When  
8 the company borrows money, it's paying. And it's the  
9 company credit that dictates the interest rate. So if a  
10 company is in financial distress and it wants to borrow  
11 money, it's likely that it's going to pay a high interest  
12 rate. Now, in this case, this is an asset that is being  
13 provided to the company. A company is not borrowing  
14 this. Unless I am missing something.

15 Q. Isn't the company loaning money?

16 A. Huh?

17 Q. The company is loaning money, is it not?

18 A. How? If it's an asset on the company's  
19 books -- it's giving shares to the LLC and the LLC is  
20 getting a note.

21 Q. Right. So it's giving up shares that were in a  
22 company a going concern, right? So that comes off the  
23 balance sheet?

24 A. Yes.

25 Q. And on the balance, it gets this nonrecourse

1 note?

2 A. Right.

3 Q. At the end of the day the only thing it can  
4 really get for that is just the shares back that is  
5 initially transferred if it were to foreclose on, right?

6 A. Where does it say that?

7 Q. It's a nonrecourse note, right?

8 A. They couldn't pay it.

9 Q. Would it matter whether Pole-Bridge Bowman had  
10 any other assets to you?

11 A. No. I am just questioning your -- you draw a  
12 conclusion that the only way -- you said that the only  
13 way is to get the shares back. And I never saw that  
14 written anywhere.

15 Q. I realize that. And that's where I was jumping  
16 ahead. I may have left out some facts from here. Do you  
17 know anything about Pole-Bridge Bowman and what kind of  
18 investments or businesses it was involved in?

19 A. I know it was an LLC. I know that Steurm was  
20 the principal of that LLC. Beyond that, I don't.

21 Q. Would it affect your assessment of whether this  
22 was an arm's-length deal to find out that Pole-Bridge  
23 Bowman was an entity that was created with no other  
24 assets solely for purposes of engaging in this  
25 transaction?

1 MR. RAMSEY: Form.

2 A. No. I don't think so.

3 Q. So if an entity has no other assets and it's a  
4 nonrecourse note, if the note isn't repaid, then isn't it  
5 true that the company's only recourse is to require the  
6 shares that it initially distributed?

7 A. Well, I mean, imagine that if one state of the  
8 world is where the value of the shares go up -- would the  
9 LLC just say, "Oh. Okay. Here is your shares back."  
10 Why wouldn't they just pay off the note and keep the  
11 shares? That makes economic sense to me. And you're  
12 dismissing that as a possibility.

13 Q. Well, isn't that what actually happened? The  
14 value of the company definitely went up once it become  
15 profitable, right?

16 A. It became profitable, but I can't say I am  
17 hypothesizing -- look, you said the only possible outcome  
18 is if they give the shares back. And I'm saying that  
19 doesn't make sense to me. I can imagine -- I am not  
20 saying it happened. But I can imagine the state of the  
21 world where it is in the economic interest to Steurm to  
22 say, "Hey, the values of these shares is increased 10  
23 times what it was in 2010. Hell. Here is the money for  
24 the note. We will close this off. I will take the  
25 shares." Why not?

1 Q. Would it affect your assessment with whether  
2 the Pole-Bridge Bowman transaction was arm's-length if  
3 you were to learn that it was engaged in part to  
4 compensate Glenn Steurm for his services?

5 A. Well, I don't think that would be a sufficient,  
6 you know, indication to eliminate that as an indication  
7 of value.

8 Q. Would it require an adjustment at least?

9 MR. RAMSEY: Form.

10 A. Look, you know, you want to have an assessment  
11 as to whether it was a deal at fair market value. That's  
12 ultimately what you're talking about. Do stock  
13 transactions occur for parties that are consultants to  
14 particularly small firms? Yes. Does it mean that they  
15 are necessarily not an arm's-length transaction? Well,  
16 no. In fact, I can imagine, you know, that you would want  
17 to strike a deal at fair market value. So I don't know  
18 that I can agree that it's a de facto collusion that  
19 someone is being -- instead of providing cash, they are  
20 given stock in a company. I don't know that is  
21 necessarily a non-arm's-length transaction or to put  
22 differently that transaction took place at something  
23 other than fair market value based solely on that.

24 Q. Isn't it a reason to question the fair market  
25 value more though?

1           A.   Well, it's certainly one of those indications  
2           that you are concerned about it. And that's what I said  
3           a minute ago, I am concerned. I think it is a  
4           transaction that an investor is going to look at. But  
5           with full knowledge at least of the information that I  
6           had, yes. I would say that there are problems with it.  
7           Just like there is problems with all these transactions.  
8           I mean everything has an issue. There is no question  
9           about that. So that's the best way I can answer your  
10          question. It's a concern. It's a problem, but all these  
11          metrics have problems. And that's why the range is  
12          important to get a sense as to whether there is some kind  
13          of assessment of valuation range each year that allows  
14          you to draw a conclusion.

15          Q.   Just so I am clear, and correct me if I am  
16          wrong. In your opinion, the fact that the Pole-Bridge  
17          Bowman transaction was in part compensation to Glenn  
18          Steurm would not necessarily affect any of your  
19          calculations in terms of what the valuation would be  
20          based on the Pole-Bridge transaction?

21          A.   No. Not in and of itself it would not.

22          Q.   But just on the broader point, if a fact-finder  
23          were to conclude that a transaction was not conducted at  
24          arm's-length, would that mean in your view the  
25          transaction should be excluded from a valuation analysis?



1 MR. RAMSEY: Form.

2 A. Well, I think the question is whether the trier  
3 of fact would conclude that it's outside of it. Not so  
4 much a valuation expert. If a trier of fact concludes  
5 that it's not arm's-length transaction, could well be I  
6 am not going to consider this transaction. From my  
7 perspective, I guess I kind of take in a little different  
8 view of this. Like I said, the ultimate determination is  
9 whether it's a fair market value. And one of the things  
10 that is kind of interesting is whether or not the  
11 valuation is within the range of other evaluations.  
12 That's kind of interesting to me. That may not convince  
13 a trier of fact. The trier of fact says, "No. It's not  
14 arm's-length. I am not going to think about that."  
15 Okay. So be it. Cross it off your list. But for me --  
16 and I think for an investor it is a data point of  
17 interest.

18 Q. For an investor, do you believe that would be  
19 appropriate to rely solely on the Pole-Bridge Bowman  
20 transaction as a basis for value?

21 A. If it was determined to be non-arm's-length?

22 Q. Either way. Just based on the facts that you  
23 know about the transaction where you question it, do you  
24 believe that it would be appropriate for an investor to  
25 base valuations solely on that transaction and not

1 consider any other valuation method?

2 MR. RAMSEY: Form. Go ahead.

3 A. The way I can answer that question is I don't  
4 know that I would look at any of these five alone and say  
5 that's the only thing you should look at or if that was  
6 the only thing available. Is it a precise, accurate  
7 measure of value? The only one that I really like that I  
8 think has the least amount of problems is the Prospect  
9 Beverage. That one -- I mean the problem with that is  
10 that it's 10 years old at that time of transaction. But,  
11 you know, look at the other dates. I mean the  
12 Eder-Goodman is four years old -- five years old.

13 Q. You're missing -- -

14 A. Six years old. Like I said before, so each of  
15 these has problems. You've got all of these right issues  
16 in many of these transactions. The Prospect, is in my  
17 view, one of the tightest comparable transactions that I  
18 have encountered in doing valuations.

19 Q. Is it a coincidence that is the transaction  
20 that results in by far the lowest value for  
21 Eber-Connecticut?

22 MR. RAMSEY: Form.

23 A. It is a coincidence. It turns out that way.  
24 But maybe that is not a coincidence. Maybe that really  
25 reflects what the value of what Eber-Connecticut was.

1 And that the value that I ascribed to the rights for  
2 let's say Eder-Goodman and Southern are just way too low.

3 Q. Did you perform any sort of sanity checks on  
4 that given that is so far away from what the actual  
5 transactions involving Eber-Connecticut were?

6 A. I am not sure what you mean.

7 MR. CALIHAN: Objection to form.

8 A. It is what it is. It depicts exactly what the  
9 valuations are from each of these metrics.

10 Q. Isn't it important to perform a sanity check on  
11 each of these valuation metrics that you arrive at? You  
12 mentioned that earlier today.

13 A. The numbers are here. What is it in addition  
14 to this that you think is necessary that I am not  
15 understanding?

16 Q. Well, does it seem rational to you that the  
17 company would be worth under \$700,000 for its equity just  
18 a few years after it was purchased for 21.6 million  
19 dollars?

20 MR. RAMSEY: Form.

21 A. Sure, sure. Valuations change all the time.

22 MR. RAMSEY: You've answered the question.

23 A. Look at Hewlett Packard. They were worth  
24 billions. How much are they worth now?

25 Q. That earlier transaction was closer in time to

1 the Prospect Beverage transaction, right? 2005 Slocum  
2 acquisition for 21.6 million dollars. That was much  
3 closer in time than Prospect Beverages, right?

4 A. Yes.

5 Q. And did you try to see whether using the  
6 Prospect Beverages ratios matched up with the price that  
7 was paid for Slocum in 2005 as a sanity check?

8 A. I don't have financials for Slocum in 2005.  
9 What I do know is that there are similarities between  
10 what the state of affairs -- good similarities for what  
11 the state of affairs was for Eber-Connecticut in 2012 and  
12 what Prospect looked like in 2010. You know, I talk  
13 about that. The market cap was very close. The amount  
14 of revenues was close. It was negative EBITDA, which is  
15 what the position of Eber-Connecticut was in. They are a  
16 distributor of alcoholic beverages. That's pretty darn  
17 good. The only concern is the time value. And you will  
18 note because of the time difference here there is  
19 deduction that is applied to the revenue ratio to account  
20 for the general change in the market conditions. Well,  
21 look. Even if you eliminate that adjustment, you know,  
22 you're still getting values of Eber-Connecticut, you  
23 know, maybe two and a half -- three million. So, you  
24 know, the one problem -- even if you transported that  
25 ratio to today or to 2012, it's still not a very big

1       number. And the characteristics in my view are quite  
2       tight.

3             Q. I am going to do a couple more things on  
4       Prospect Beverages before we go to Farmers. Looking at  
5       Exhibit C4. You're missing a lot of numbers there for  
6       the total price, premium for additional rights,  
7       percentage ownership, things like that. Why is that?

8             MR. CALIHAN: Brian, could you repeat that  
9       question, please? I lost you.

10            Q. I was asking why it is that there are a number  
11       of line items for which there is missing information,  
12       such as total price for the transaction?

13            MR. CALIHAN: You referred to a page number.

14            Q. Sorry. Exhibit C4 in Exhibit in the Torchio  
15       report.

16            A. Because I was able to obtain the enterprise  
17       value and the recent revenue figures from I believe it's  
18       Capital IQ.

19            Q. How do you know that those numbers are reliable  
20       when you don't have the price for the transactions?

21            A. They are as reliable as Capital IQ is reliable.  
22       So if you're asking me whether I am relying on Capital  
23       IQ, I am.

24            Q. And did you attempt to find out why Capital IQ  
25       didn't have data on the total price?

1 A. No.

2 Q. Did you look at the SCC filings in connection  
3 with this acquisition?

4 A. I don't recollect.

5 Q. Are you aware that this was not a complete  
6 asset sale? It was more of a merger?

7 A. Yes.

8 Q. And so Prospect Beverages ended up with four  
9 seats on the new company for example?

10 A. Yes.

11 Q. Okay. Did that factor into your analysis?

12 A. No.

13 Q. Aren't those additional rights that need to be  
14 accounted for?

15 A. No. You're effectively merging your companies  
16 together. That's a controlled transaction. I don't draw  
17 a distinction there.

18 Q. So when do you -- so if an acquisition involves  
19 additional rights, when do you decide to include that in  
20 value or not?

21 A. This involved a sale of control, which is even,  
22 you know, considering the fact that the ROFR that existed  
23 as of 2012 was a significant deterrent of sell control, I  
24 am still reflecting that the value of control in this  
25 transaction. So this is not a minority interest

1 valuation. This is a valuation of control. You're  
2 taking this company and you're merging it with your  
3 company. That's a control transaction.

4 Q. Were you conducting a minority interest  
5 valuation in this case?

6 A. No, I did not. But if you're going to assess  
7 whether what the price would be to disburse investors,  
8 then you would have to take into account what the  
9 minority interest is or, put more specifically what the  
10 marketability discount it is.

11 Q. Are you aware that under my New York law, when  
12 you do value a minority interest in a company, an  
13 appraisal valuation expert is not permitted to make any  
14 discounts for lack of control?

15 MR. RAMSEY: Form. You're asking for a  
16 legal conclusion.

17 Q. I am asking if he is aware in that work.

18 A. In the context of a merger when you're  
19 assessing fair value for a company, you are not allowed  
20 to take discounts for a minority interest or discounts  
21 for marketability.

22 Q. And would that be the case also in assessing a  
23 freeze-out merger?

24 A. Yes.

25 Q. Did you make those discounts in this case?

1           A.    No.

2           Q.    By removing the controlled premium or right of  
3           first refusal premium, which has some similarities to it,  
4           didn't you effectively make those discounts?

5                   MR. RAMSEY:   Form.

6           A.    No.   That's not true.   What I am assessing is  
7           the ability for the company to get a controlled premium.  
8           To the extent there is a merger and the merger provides a  
9           controlled premium and you're trying to assess fair  
10          value, you're assessing that fair value relative to what  
11          they got.   How much of that controlled premium is being  
12          paid?   And what fraction of that controlled premium is  
13          part of fair value?   And what I am saying here is  
14          different.   What I am saying here is that it's highly  
15          unlikely that there would be a controlled premium paid  
16          given the existence of the ROFR.

17          Q.    And you say that even though you're aware of  
18          what happened in 2012 with the transfer of Eber-Metro?

19                   MR. RAMSEY:   Form.

20          A.    I don't understand that.

21          Q.    Well, was it your understanding that the ROFR  
22          was implicated of the transfer to Eber-Metro?

23          A.    Was implicated?

24          Q.    Did Eder-Goodman have a right to try to acquire  
25          it instead of Alexbay?



1           A.    I don't know.

2           Q.    Okay. I will represent to you for the sake of  
3           our, you know, discussion here hypothetical-type-thing  
4           since I know you don't have time to look it at and  
5           you're not a lawyer. Assume that Eber-Metro and its  
6           control was not restricted at all by the Eder-Goodman  
7           transaction. That they did not cover for that  
8           contingency while Eber-Metro could not sell its units in  
9           Eber-Connecticut, it could sell itself and with it  
10          control of Eber-Connecticut bypassing all of  
11          Eder-Goodman's rights. Do you follow me?

12          A.    Okay.

13          Q.    And in that circumstance, shouldn't Eber-Metro  
14          and its interest in Eber-Connecticut receive a control  
15          premium?

16                   MR. RAMSEY: Form. Go ahead.

17          A.    Let me make sure I understand this. You're  
18          saying that the ROFR in Eber-Connecticut was relevant or  
19          nonbinding to the sale of Eber-Metro?

20          Q.    Correct. There was no change of control clause  
21          in there like you would see in certain contracts to  
22          trigger a, you know, a bonus or gold parachute or  
23          something. They did not include that in the document.

24          A.    Uh-huh.

25          Q.    So taking that representation that that's the

1 lay of the land, would that affect your valuation here?

2 A. I have to think about that. My natural  
3 reaction is how is that going to Eber-Connecticut?

4 Q. What do you mean?

5 A. Well, if you sell Eber-Metro, who is still  
6 controlling Eber-Connecticut? What about the decisions  
7 at the level of the operating company?

8 Q. Eber-Metro continues to be the legal entity  
9 that controls it.

10 A. I get that. I understand that. But when it  
11 comes to making decisions about Eber-Connecticut the  
12 actual operations of that company and the ability to  
13 merge that company with, you know, another large  
14 distribution company -- I mean, look, I am not a lawyer.  
15 I can't -- it sounds strange to me that you could  
16 effectively merge the assets -- merge the company of  
17 Eber-Connecticut with another company.

18 Q. By selling its parent?

19 A. By selling its parent.

20 Q. That's exactly what happened in 2012 though,  
21 isn't it?

22 MR. RAMSEY: Form.

23 Q. It went from Eber Wine and Liquor to Alexbay.  
24 Abdomen.

25 A. What operating company? What operating company

1 merged with them?

2 Q. I'm not suggesting it's necessarily an  
3 operating company.

4 A. That's the point. Let me explain something to  
5 you because I think you don't understand the concept of  
6 what a control premium constitutes.

7 Q. Okay. Explain it to me.

8 A. Look, a control premium is not something that  
9 is going to be given on high. This is a transaction  
10 where there must be a control premium. A control premium  
11 comes from the fact that by combining assets with another  
12 company that you can have synergies. Synergies means one  
13 plus one equals three. Are you with me?

14 Q. I am with you so far.

15 A. All right. So now -- and what happens in a  
16 merger is that when you've got synergies when you can  
17 take that company and you can do something different with  
18 it by combining it with other assets and create  
19 synergies. You take some of that synergies and you pay  
20 the target above and beyond its stand-alone value. That  
21 part of the synergies that's paid to the company above  
22 and beyond its stand-alone value, that's what's referred  
23 to as the control premium. Let me finish. Now, if you  
24 got a situation where you're trying to get a control  
25 premium what are you going to look for? Who is going to

1 pay the control premium? It's going to be a company that  
2 when you combine it -- when you put those assets together  
3 it creates synergies. Well, there is no synergies  
4 created by Alexbay. That's just a shell game. And what  
5 the ROFR is intended to prevent -- effectively prevent  
6 from Eder-Goodman's standpoint is they don't want these  
7 assets to merger with, for example, Southern or any other  
8 distribution to get a leg in. They are using that as a  
9 means of preventing or almost de facto establishing a  
10 quasi-monopoly in order to prevent that from happening.  
11 And I didn't see anything in transaction with Alexbay  
12 that would put -- that would create a control premium.  
13 There is no synergies involved that would constitute a  
14 control premium.

15 Q. I thought you were not focusing on these  
16 particular parties, right? It doesn't matter that it's  
17 Alexbay. It could be any reasonable investor. Which is  
18 it? Is it Alexbay?

19 A. Any reasonable investor. That's exactly right.

20 Q. Forget Alexbay. We're talking about any  
21 reasonable -- say it's Carol Icon. He's not in the  
22 business yet, but he loves to get into companies and pay  
23 control premium. You with me so far?

24 A. Yes.

25 Q. You are you telling me he wouldn't pay a

1 control premium for this?

2 A. Only if he could combine it. And I can't  
3 understand how with the ROFR that he could combine the  
4 asset of Eber-Connecticut. That seems like it would be  
5 directly ---

6 Q. Isn't it fair to say that synergies is only one  
7 way in which a control premium can come about? And do  
8 you agree with that much or no?

9 A. No.

10 Q. Is it fair to say that a control premium is  
11 paid where a person believed -- the buyer believes he can  
12 manage the company more effectively?

13 A. That's fine. You can refer to that as a  
14 synergy.

15 Q. Okay. So they aren't necessarily in the  
16 business themselves already active, correct?

17 A. Fine.

18 Q. And so what you've seen from the  
19 Eber-Connecticut financials, is it fair to say that the  
20 reasonable investor can look at that and go almost anyone  
21 can manage that company better?

22 A. No.

23 Q. Do you have any reason to believe that it was  
24 well managed?

25 MR. RAMSEY: Form.

1           A.    I mean I have no reason to believe it wasn't  
2 managed.

3           Q.    Right.

4           A.    Operating the company for decades as far as I  
5 can remember. No, I don't see that as a plausible  
6 scenario.

7           Q.    They have been run out of business in New York,  
8 right?

9           A.    Yes.

10          Q.    And then in Connecticut this company that had  
11 been making money was then losing money for six years in  
12 a row?

13          A.    Yes.

14          Q.    Do you think a reasonable investor would think  
15 that company has been well managed?

16                   MR. RAMSEY: Form.

17          A.    Sure. That in and of itself is not to dictate  
18 that it's poorly managed. I mean there is exogenous  
19 events -- competition. That just doesn't follow.

20          Q.    So let's say -- I am not saying necessarily,  
21 but let me rephrase then. Do you think that a reasonable  
22 investor could conclude that the company was not well  
23 managed based on the facts that I just described?

24          A.    No.

25                   MR. CALIHAN: Form.

1 MR. RAMSEY: Form.

2 A. Could or would?

3 Q. Could.

4 A. You can draw any kind possibilities, yes.

5 Q. We're focused only on reasonable possibilities?

6 A. Then I am not sure that it was reasonable. I  
7 think that the facts about the degree of competition that  
8 occurred is going to dictate whether or not any other can  
9 manage this any better.

10 MR. RAMSEY: Whenever you get to a good  
11 breaking point, but the lunch is here.

12 Q. Almost there. Let me just finish up this train  
13 of thought. Just so we're clear then, you can't foresee  
14 any circumstances in which you think a control premium  
15 would apply to Eber-Metro's controlling interest in  
16 Eber-Connecticut; is that right?

17 A. The essence of the control premium is going to  
18 come about by someone who is able to combine assets. And  
19 that's exactly what the ROFR is trying to prevent. And  
20 even -- I mean, look, even if you thought you could run  
21 it better, you're not going to pay for something that  
22 you're not going to get value out of. And if you're not  
23 going to significantly improve the valuation beyond the  
24 stand-alone value, you're not going to pay a control  
25 premium. That's just economics. That's all I am saying.

1 The big synergies and consequently the control premium  
2 come about by combining, let's say, Eber-Connecticut with  
3 Southern. And Southern wanted in Connecticut. And that  
4 could be a way for them to get in. And this is exactly  
5 what the ROFR is meant to prevent.

6 Q. Right. So what if as a matter of law to  
7 conclude that the ROFR did not prevent Southern in  
8 combining with or acquiring Eber-Metro and control of  
9 Eber-Connecticut, would that affect your opinion on the  
10 valuation?

11 MR. RAMSEY: Form.

12 A. It could have an effect. I would have to think  
13 about what -- what does that mean as a matter of law. Is  
14 that definitive --

15 Q. In determining the contract.

16 A. That an investor would completely know that  
17 that's the case. That the ROFR that exists at the level  
18 could not be used to prevent the merger of assets. I  
19 don't know. You know, it's again -- it is a legal point.  
20 And if I am told that no -- Eder-Goodman screwed up.  
21 They had a loophole they didn't think about. This could  
22 be accomplished through this loophole. Okay.

23 Q. Let's take our lunch break.

24 (Whereupon, there is a short recess in the  
25 proceedings.)



1           Q.    So still talking a little bit about Prospect  
2   Beverages, which you said you think is the best of the  
3   different --

4           A.    I said I liked it, yes.

5           Q.    You liked it the best. You know what the  
6   literature says the best of the five would be?

7           A.    The literature?

8           Q.    Yes.

9                   MR. RAMSEY: Form.

10          Q.    The literature in your field of valuation.

11                   MR. RAMSEY: Literature of what? I missed  
12                   the last part.

13          Q.    In your field of valuation.

14          A.    Well, I mean it's all based on facts and  
15   circumstances. I don't know whether literature is going  
16   to say definitively which metric is the best in all  
17   circumstances. As I said in my report, you know, if you  
18   have the legitimate transaction close in time, that's a  
19   very good indication of value.

20          Q.    Legitimate transaction for the company in  
21   question?

22          A.    For stock in the company. That's a good one.  
23   Comparables are good, but comparables can be, you know,  
24   disputed about whether it's comparable enough. That's  
25   with regard to the training comps. Ideally you would

1       like to find a company that is the exact perfect mirror  
2       image of the company you're trying to value. That never  
3       occurs. So you're left with trying to find enough  
4       sufficient characteristics that the same microeconomics  
5       that drive -- are comparable of driving your company.  
6       And if that exists then there is a pretty good chance  
7       that is a decent measure. But more often than not, what  
8       the literature is going to suggest is that you have a  
9       number of different valuations. Relying on one is  
10      chancy. And the more you have, the better you get a fair  
11      assessment as to what the value of the company is.

12           Q.    Now, in terms of Prospect Beverages, did you  
13      see the microeconomics as being -- let me step back and  
14      ask that. When you say the microeconomics are  
15      comparable, what are the degrees of comparability and how  
16      do you factor in the differences to weigh those? Just  
17      walk me through the process when you look at --

18           A.    So going to start SIC code. Let me look at the  
19      SIC code and see who is the SIC code that encompasses the  
20      company in question. That's problematic because many  
21      companies that have a SIC code --

22           Q.    Let's define SIC code for the record?

23           A.    Standard industrial classification. And so now  
24      you're kind of looking at maybe a four-digit SIC code or  
25      maybe look at individual companies in that SIC code and

1 try to understand based upon the general characteristics  
2 of the company whether there is a good fit or not a good  
3 fit. So if you're looking at a company that is  
4 publiclytraded or is a transaction, you know, you're  
5 going to look for the kind of characteristics that  
6 generally dictate risk and reward in that particular  
7 industry or that SIC segment. So the size of the company  
8 matters. So, you know, the market capitalization  
9 matters. The growth -- the historic growth of a company  
10 matters. Probability matters. The line of business can  
11 also be a relevant factor. Those are the, you know,  
12 generally the kinds of things that one looks at. Now,  
13 with that said I taught and I have been involved in a  
14 number of transactions. And all those transactions the  
15 investment bankers use and rely on comparable  
16 transactions, comparable trading multiples. And  
17 notwithstanding that you're never going to find a pure  
18 play that matches your company exactly. So you try as  
19 best you can in understanding that from an investor's  
20 perspective what you're looking at is effectively risk  
21 and reward. You're trying to understand the growth rate  
22 and the riskiness of the company is similar. And those  
23 characteristics that I talked about generally go to those  
24 characteristics. So that's kind of what you're going to  
25 focus on. And then secondary is whether the same kinds

1 of general economic factors that dictate the expected  
2 growth are similar. So, for example, you know, while not  
3 a close fit looking at distribution companies to the  
4 extent there are no pure play liquor distribution  
5 companies, it's reasonable. Is it great? No. It's one  
6 the problems with the trading comp that I am using. It's  
7 not a tight condition. There are a similarities with  
8 regard to the economics, but not great. So can you rely  
9 on that solely? Probably not.

10 Q. What were the products that Prospect Beverages  
11 distributed?

12 A. I believe it was mostly beer. I think Pabst  
13 maybe.

14 Q. Pabst. And some malt liquor as well?

15 MR. RAMSEY: My favorite brand.

16 Q. I am not from Rochester. No offense. And what  
17 do you see as comparable about that to Wine and Liquor?

18 A. Well, look, I saw what Mr. Liebman said that to  
19 me is a difference without substance. If you're asking  
20 any investment banker, would you think it's comparable to  
21 look at a distribution company that sells beer and a  
22 distribution company that sells wine? And I would  
23 guarantee you that ten out of ten would say yes, that's  
24 comparable. Are they exact matches? Is it a mirror  
25 image? No. But the economics are the same. Not exactly

1 the same, but they are similar enough.

2 Q. Is it true in New York?

3 A. Pardon?

4 Q. Did you adjust that view for the geographic  
5 locations?

6 A. That's the other thing. I mean, come on. In  
7 other words, you know, if I took what Mr. Liebman is  
8 saying literally I would have to find a company that  
9 distributes wine in Connecticut and that sells Spanish  
10 wines -- Australian wines. I mean, come on. That is  
11 such a straw man. That I mean -- it just to me that was  
12 ridiculous. I have to say.

13 Q. Didn't you have a comparable like that?

14 A. Did I have a comparable like what?

15 Q. Eber-Connecticut had gone through a couple of  
16 prior transactions it was engaged in and it had those  
17 similarities because it was still in Connecticut and  
18 doing those sorts of thing.

19 A. I did look at those transactions.

20 Q. Right. So isn't the point that given the  
21 distinctions and the difficulty in finding other  
22 comparables, given the legal landscape for the  
23 regulations of wine and liquor, isn't it better to use  
24 the comparables of the actual prior transactions for the  
25 company in this instance because everything else is just

1 too different and too many different variables?

2 MR. RAMSEY: Form.

3 A. No. I think you mischaracterized and  
4 misinterpreted what I just said. I think these  
5 differences that are being put forward, that it does  
6 business in Connecticut and not New York, that it sells  
7 wine and not beer, those are differences without  
8 distinction. From an investor's perspective is that  
9 really going to matter? Does that change the riskiness?  
10 Does that change the potential growth rate? I think  
11 that's just -- like I said, it's a fallacy. It's a straw  
12 man. If you're asking me --

13 Q. Have you actually asked any business people  
14 about that? You're saying if you asked a business person  
15 or an investor, you know, about the difference they  
16 wouldn't see one. Have you actually asked anyone that or  
17 are you just speculating?

18 MR. RAMSEY: Form.

19 A. It's not speculation. It's by experience.

20 Q. Have you actually asked anyone that?

21 A. No.

22 Q. Do you see a difference between beer  
23 distribution and wine and liquor distribution?

24 A. Of course there is a difference. But it's a  
25 difference without a distinction.

1 Q. Have you asked anyone that question? My  
2 question is, have you asked anyone else that question?

3 A. No.

4 Q. Why not?

5 A. I don't have to. I know how to do valuations.  
6 I know how to look at comparable companies. I have been  
7 doing it for 30 years. I don't have to ask anybody.  
8 That's my belief. That's what I am going to. That's  
9 taught in school. That's what investment bankers do all  
10 the time in merges. That's what I am using.

11 Q. Have you ever valued a power company or energy  
12 company?

13 A. Yes.

14 Q. What kind of energy company was that?

15 A. It was an electric and generation and gas  
16 distribution company.

17 Q. How did it generate electricity?

18 A. They had coal fire power plants. They had  
19 nuclear power plants and gas.

20 Q. And were the -- did you value the different  
21 components of that separately nuclear from coal?

22 A. The different generations of electricity?

23 Q. Yes.

24 A. No.

25 Q. Do you believe that a nuclear company -- say a

1 company is just doing nuclear and another company is  
2 burning coal. Do you believe that those two companies  
3 would be deemed comparable?

4 A. I would include, yes. You got to take into  
5 account that there are different characteristics, but in  
6 terms of developing a range of values, yeah. I would  
7 include them.

8 Q. Riskiness factors are very different, correct?

9 MR. RAMSEY: Form.

10 A. There is risk for a variety of different  
11 reasons. Nuclear plants have risk because the risk of  
12 regularity control is quite substantial. Although small,  
13 the risk of something, a catastrophe happening. Coal  
14 fire plants have risk because you're going to have  
15 environmental regulations that you've got to adhere to  
16 that make those plants very costly. And can result in  
17 some substantial, you know, uncertainty about the future.  
18 So there are differences in risk characteristics, but  
19 there are risks that cross all those kinds of powers  
20 plants.

21 Q. So the difference in regularity control is  
22 something that has to be taken into consideration; is  
23 that fair to say?

24 A. No. What I said is that the riskiness of each  
25 of those things can be narrowed down to where it comes



1 from. And the riskiness, it permeates the industry  
2 itself.

3 Q. Did you, for purposes of this case, familiarize  
4 yourself with the Connecticut franchise laws for liquor  
5 and wine distributors?

6 A. You know, I have some recollection. I didn't  
7 read anything. I have some recollection of discussing  
8 some of that with either Wendy or Lester?

9 Q. And what did they tell you about that?

10 A. I don't recall specifically.

11 Q. If you don't recall specifically, do you recall  
12 what you concluded based on what they told you?

13 A. Well, that like many states in the northeast  
14 there is a lot of regulation involving liquor sales. The  
15 principal discussion I remember having is what would  
16 happen under a liquidation scenario. And that there  
17 would be limited buyers for inventory under a liquidation  
18 scenario due primary to the restrictions in the  
19 Connecticut law. But there were similar restrictions in  
20 the other states, particularly those states in the  
21 northeast.

22 Q. Did you discuss with them how those same laws  
23 also create barriers and entry for competitors?

24 MR. RAMSEY: Form.

25 A. You know, I do remember talking about that. I

1 remember also reading something. I think it might have  
2 been in Lester's affidavit about the differential  
3 barriers to entry. And I think it was concerning the  
4 notion of an exclusive distributorship and that vague  
5 recollection about ways in which other distributors can  
6 become distributors of the products that you're carrying.

7 Q. Okay. So is it fair to say that barriers for  
8 entry for competitors is something -- if there are such  
9 barriers, that is something that reduces the riskiness of  
10 the business?

11 A. It's possible.

12 Q. I will show you a business plan from December  
13 2009 from Eber-Connecticut that's been previously marked  
14 as Exhibit 65. And I want to draw your attention to the  
15 second to last paragraph there.

16 A. Okay. I see that.

17 Q. Is that consistent with what Wendy and Lester  
18 told you?

19 A. Well, let me -- so I am reading from the  
20 affidavit from Lester that the Connecticut laws do not  
21 insulate a distributor from the risk of losing exclusive  
22 right or to sell wine product in Connecticut. Rather at  
23 most they prevented a distributor from being completely  
24 excluded from the sale of a wine product. Although,  
25 Connecticut law prevents a supplier from completely

1       terminating its relationship with the distributor --  
2       which I think what this paragraph says -- without good  
3       cause, a supplier may still dual -- in quotes -- dual a  
4       distributor at any time. Meaning that the supplier can  
5       sell to a new preferred distributor in addition to the  
6       original distributor. Thus the original distributor can  
7       be deprived of the benefit of being an exclusive  
8       distributor of a product within Connecticut without any  
9       protection under the franchise law. In my experience,  
10      the new preferred distributor typically ends up selling  
11      the majority of the supplier's particular product in  
12      Connecticut since the new preferred distributor receives  
13      marketing support and programming that is not offered to  
14      the original distributor. So I think that paragraph is  
15      consistent with what I just read, but also the paragraph  
16      provides additional information that is not reflected in  
17      that paragraph.

18           Q.     Okay. But combining what you just read with  
19      what Lester and Wendy just told you about the limited  
20      number of people out there, it's fair to say that the  
21      competitive pressures facing Eber-Connecticut given  
22      Connecticut's regulations were lower than they would be  
23      for a similar company in a state that did not have those  
24      franchise laws protecting it?

25                   MR. RAMSEY:   Form.

1           A.    I mean there is some protection, but based upon  
2           what I just read, it's minimal.  If you can basically  
3           skirt those laws by having new supplier and while they  
4           have to still -- sorry -- new distributor -- and while  
5           the supplier still has to sell to you under the law, if  
6           they have taken away your business -- it's really pretty  
7           much a hollow guarantee.  I mean it's -- you can lose  
8           your business.  And according to this article, it's not  
9           uncommon.

10          Q.    Well, in a case of -- do you know how many  
11          distributors of wine and liquor there were at the time of  
12          the transfer?

13          A.    No.

14          Q.    Would that be important information for you to  
15          know?

16          A.    No.

17          Q.    So if it was just Eber-Goodman and Eber  
18          Brothers.  And Eber-Goodman was an investor in this  
19          company and subject to all sorts of restrictions in terms  
20          of poaching their different customers, you're saying that  
21          wouldn't affect your opinion?

22                   MR. RAMSEY:  Form.

23          A.    It didn't factor into my opinion and no.  I  
24          mean, you set up very extreme examples that I don't think  
25          exist in order to try to get me to answer to a

1 hypothetical that is outrageously simplified.

2 Q. It's more I am testing the integrity of your  
3 opinion.

4 A. But the integrity of my opinion is based on  
5 reality. Not upon some figment of the hypothetical world  
6 where one distributor exists in the State of Connecticut.  
7 It didn't factor into my opinion. If ultimately at trial  
8 you think it is a factor, bring it up and we will discuss  
9 it. And let the court decide.

10 Q. In New York is beer sold in the same place as  
11 wine and liquor to customers?

12 A. No.

13 Q. Did that affect your opinion at all?

14 A. It did not factor into my opinion.

15 Q. Have you ever worked with companies that are  
16 involved in retail sales of beer?

17 A. Retail sales of beer. So conjunctively I have  
18 been involved in valuations of grocery stores that sell  
19 beer. And I have been in valuations of producers of  
20 beer. Close as they come.

21 Q. So is it fair to say the customer profile for a  
22 beer distributor is very different than the customer  
23 profile for a wine and liquor distributor in the State of  
24 New York?

25 MR. RAMSEY: Form.

1           A.    I don't know about very different.

2           Q.    The same stores can't sell the same things,  
3           right?

4           A.    That's true.  Ultimately there is a drive  
5           demand for alcohol.  The demand comes from customers and  
6           that's the key.  That's where the sales come from.  If  
7           the customers aren't buying as a distributor, you're not  
8           making sales.  So the economic model -- it starts for the  
9           retail customer who is buying alcohol.  And what drives  
10          those customers' desire for alcohol.  And so that's  
11          what's driving.  And whether you're selling to a grocery  
12          or a wine or liquor store, it's still the same derived  
13          demand that is the ultimate microeconomic factors that  
14          are driving sales and just driving the value to the  
15          distributor.

16          Q.    Are you aware of -- well, if you dealt with  
17          grocery stores did you encounter -- what kind of size of  
18          grocery store chain are we talking about here?  National?  
19          Regional?

20          A.    I think it was regional.  It was stores owned  
21          by the Half Brothers.  I think it was down in Virginia or  
22          D.C.

23          Q.    And did they operate largely on generating  
24          profits through vendor credits?

25          A.    I don't recall.

1           Q.    Are you familiar with how vendor credits work  
2           in the retail industry?

3           A.    I don't remember.

4           Q.    And do you know how purchase orders are placed  
5           by wine and liquor companies in New York?

6           A.    No.

7           Q.    So in your report you noted that generally  
8           forward projections provide a better way of valuating a  
9           company than past results; is that a correct statement?

10          A.    Well, let me put a fine point on it.  A company  
11          valuation is predicated on the present value of future  
12          cash flows to the extent that the history provides you  
13          with a yardstick to estimate future cash flows.  That's  
14          the importance of the historical numbers.

15          Q.    But if history -- are there circumstances in  
16          which history does not provide a useful yardstick?

17          A.    Sure.

18          Q.    Like what?

19          A.    Well, like a complete shift in the business of  
20          a company.  You getting into something different.  You  
21          develop a new product.  Could be all kinds of reasons  
22          that history is not an indication of the future.

23          Q.    And so, for example, if a company had recently  
24          hired a strategic consultant and changed the focus of its  
25          business, is that one reason why historical results would

1 be a less reliable yardstick?

2 MR. RAMSEY: Form.

3 A. Well, I don't know about a consultant but  
4 clearly.

5 Q. Following your consultant's advice.

6 A. If you're changing your business, if you're  
7 doing something different than you did historically you  
8 could -- it could alter your expected growth in the  
9 company. Different products of course have different  
10 expected growth rates or potential growth rates.

11 Q. In a valuation analysis, if a company doesn't  
12 have its own projections at the time of the transaction,  
13 have you ever attempted to create projections based upon  
14 what historical cash flows have been?

15 A. It's been my practice not to do that. I think  
16 it entails speculation. And effectively what your -- the  
17 most I have done is to try to assess what the expected  
18 growth rate is. But I generally do not when there are no  
19 projections, I generally do not try to come up with my  
20 own projections.

21 Q. In those circumstances is it relevant to the  
22 analysis if management believes, without putting a  
23 particular number on it, that the business is turning  
24 around and will be profitable in the new future?

25 A. I think management expectations are always



1 consideration I would say.

2 Q. And what is your understanding of what  
3 management's expectations were at the time of the Alexbay  
4 transfer in the terms of the business returning to  
5 profitability?

6 A. My recollection is that there was no immediate  
7 return of profitability and no substantial change in the  
8 growth rate from the historical numbers.

9 Q. And where did you get that understanding?

10 A. Discussing it with Wendy.

11 Q. Okay. And if Wendy made different statements  
12 at the time and around the transaction such as to banks  
13 expressing her optimism in the business improving in the  
14 future, would you consider those statements more reliable  
15 or statements in further interest of her litigation?

16 MR. RAMSEY: Form.

17 A. Yeah. I think there are -- look, my experience  
18 with providing information to banks, you're always  
19 presenting an optimistic case because you want funding.  
20 And you're not going to say that it looks like we're  
21 going down the tube. Why would you want to give us any  
22 money? Would I weigh those things? Sure. I consider  
23 those two. Those are equally important.

24 Q. So the context in which someone makes a  
25 statement about management expectations is relevant?

1 MR. RAMSEY: Form.

2 A. It's relevant.

3 Q. Put a spin on it for whatever reason, fair to  
4 say?

5 A. Sure.

6 Q. And much more so than historical earnings it's  
7 easier for management to play with the numbers a little  
8 bit when it comes to forward projections without doing  
9 anything that might get them sued for security fraud; is  
10 that fair to say?

11 MR. CROWE: Form.

12 A. I don't know what you mean.

13 Q. In terms of taking a more aggressive position  
14 than what the projections are.

15 A. Behavior being what it is. You know, certainly  
16 if you're banker and you're being presented with  
17 projections and not projections, but with some kind of,  
18 you know, qualitative view as to what you think is going  
19 to happen. You take it into account. I hear you. But  
20 the historic numbers don't bear that out. What is it  
21 that you're going to do differently that is going to  
22 create better profits? I mean -- look, to the extent  
23 that something has positive valuation what is baked into  
24 that is profits in the future. There can't be a positive  
25 valuation if it's never expected to generate profits.

1           Q.    In the case of Eber-Connecticut although it had  
2           not yet turned profitable, it's correct that the company  
3           was reducing its losses consistently every year as of  
4           2012, right?

5           A.    There was big losses that I occurred in the  
6           maybe 2008/2009 time frame in the recession. But it was  
7           still negative as of 2012. And I think it stayed  
8           negative until I don't know, 2015 or 2016 is my  
9           recollection.

10          Q.    But the overall trend was going towards  
11          positive, correct?

12                   MR. RAMSEY:   Form.

13          A.    Well, let's take a look. Okay. So I am  
14          looking at Paragraph 50 that shows the financials or  
15          revenue profit from operations and EBITDA from 2007 to  
16          2012. So the first line revenue indicates that the  
17          growth is actually somewhat flat or declining from 2007.  
18          The profitability from operations that is pretty  
19          volatile. It's negative \$656,000 in 2007. And then it's  
20          improved slightly in 2008 to \$140,000 negative. But then  
21          in 2009 -- I think this is what I was referring to -- in  
22          2009 it's minus 2.3 million. And 2010 it is \$920,000  
23          negative. And then we're kind of back to where we were  
24          in 2007. In 2011 the profit from operations is negative  
25          \$687,000, which is similar to what it was in 2007. And

1 then there was an improvement in 2012 that reduced the  
2 loss to negative \$299,000, which is again sort of similar  
3 to what happened in 2008. So if you're asking for a  
4 discernable trend there, no. I don't see that. It's  
5 bouncing around. It's sort of -- the only improvement  
6 that I see there is -- is well, it looks like the same  
7 improvement. I mean, you know, if you look at the  
8 difference between 2007 and 2008 and say that's  
9 improvement. Then in 2009 it's negative 2 million. You  
10 look at the improvement -- well, then in 2010 it's  
11 negative \$120,000.

12 Q. So looking at 2009 to 2012 each of those years  
13 it goes from really bad to bad to less bad each year  
14 after that?

15 MR. RAMSEY: Form.

16 A. Let's look at 2007 to 2012. Why are you  
17 limiting?

18 Q. Do you know what happened in 2009?

19 A. Yes. There was a recession.

20 Q. No. Do you know what happened to  
21 Eber-Connecticut in 2009 that explains that?

22 A. I don't recall.

23 Q. Are you familiar with the brand Yellow Tail  
24 wine?

25 A. Yes.

1 Q. And you heard about how Eber got dualled?

2 A. Dualled.

3 Q. They also tell you that Yellow Tail in any  
4 event was a very low margin wine for them?

5 MR. RAMSEY: Form.

6 Q. They sold a lot of volume, but never made much  
7 profit off it.

8 A. Okay.

9 Q. And in 2010 that's when the company retained  
10 Glenn Steurm and began to reorganize and restructure  
11 their business plan. Did you know that?

12 A. Yes.

13 Q. And did you ask when that Wendy and Lester --  
14 whether they actually were implementing changes that  
15 explained the positive trend from 2009 to 2012?

16 MR. RAMSEY: Form.

17 A. To explain the trend? No.

18 Q. Does it matter why the financials were  
19 improving from 2009 to 2012 in your analysis?

20 A. Well, I mean I am looking at the whole series  
21 and I don't see any drastic improvement. You want to  
22 focus on 2009. Okay. That explains a big loss in that  
23 year. I just don't -- looking at the numbers it doesn't  
24 look like -- you can say the same thing. Put a blinder  
25 on and look at 2007 and 2008. And by your conclusion you

1 would say, "Oh, my gosh. Look at the improvement. It  
2 lost \$656,000 in 2007, but it only lost \$140,000. What a  
3 drastic improvement. This is great. What a growth rate  
4 it's going to be. Let's look at 2009. There is  
5 explanations, but look at the loss for 2009. Look at  
6 2010. There is a big loss for 2010. So taking a  
7 snapshot of 2007 and 2008 didn't give a very good  
8 indication about what was going to happen in 2009 and  
9 2010, did it?

10 Q. And by the same token it does -- looking at  
11 2007 and 2008, including that with all this and refusing  
12 to look at the trend within the most recent four years,  
13 doesn't give you a very good snapshot of what the future  
14 is going to hold, does it?

15 A. Well, I think the more data you have, the  
16 better you can understand what the trend is. Looks to me  
17 as it's bouncing around. I get it. They hire Steurm. I  
18 don't see any drastic improvement here. It's bouncing  
19 around. Big negatives. Slightly less negatives. Big  
20 negatives. Slightly less negatives.

21 Q. It didn't happen that many times.

22 A. It did. Big negative 2007. Slightly less  
23 negative 2008. Big negative 2009. Slight less negative  
24 in 2010. Big negative in 2011. Slightly less negative  
25 in 2012.

1 Q. You just did it wrong there. It went slightly  
2 less negative in 2010. Slightly less negative in 2011.  
3 Slightly less negative in 2012. That's the trend as far  
4 as earning goes. It doesn't jump back up, does it?

5 MR. RAMSEY: Form. Are you testifying,  
6 Brian, or are you asking him the question?

7 A. I am looking at the bouncing around. It's  
8 bouncing.

9 Q. Do you see that revenue?

10 A. I see it. Do you see it? You're trying to  
11 assess a trend here. I don't see a trend.

12 Q. Do you see revenue is essentially flat from  
13 2010, 2011 and 2012 right around 36.5 million dollars?

14 A. Here is what I see. I see that the beginning  
15 of this series looks like the end of the series. That's  
16 what I see.

17 Q. So you would predict based on this that in  
18 2013 there would be another huge loss like after 2008?  
19 Is that what you're saying?

20 MR. RAMSEY: Form.

21 A. No. I said what I said. I am looking at what  
22 the profitability looks like in 2007 and 2008. That  
23 looks awfully similar to what happened in 2011 and 2012.  
24 So where is the trend?

25 Q. Do you think that the Yellow Tail was going to

1 dual them again?

2 A. Yellow Tail went out in 2009. That's what you  
3 just told me.

4 Q. So past event couldn't reoccur, right?

5 MR. RAMSEY: Form.

6 A. Whether it could occur with another wine, I  
7 don't know.

8 Q. Do you know whether Yellow Tail --

9 A. I am looking at these numbers and I don't see  
10 the trend that you see.

11 Q. Okay. That's fine. And as part of your  
12 analysis you did not attempt to determine whether Lester  
13 and Wendy Eber were making changes in the business to  
14 improve profitability; is that right?

15 MR. RAMSEY: Form.

16 A. My analysis reflects and all these analysis  
17 reflects that there will be improvement in profits  
18 because it's positive equity value for Eber-Connecticut.  
19 So in all those scenarios, there is improvement in  
20 profit.

21 Q. As part of your analysis you've reviewed the  
22 May 23, 2012 order of the court in which it declared that  
23 Alexbay's acceptance of Eber-Metro's stock in  
24 satisfaction of the debt was commercially reasonable,  
25 correct?



1 A. Yes.

2 Q. Did you rely on that in any way?

3 A. No.

4 Q. Did you make any attempt to asses whether that  
5 the information to provided to that court was accurate?

6 A. No. I mean only to the extent that I am doing a  
7 valuation with regard to Pole-Bridge Bowman, which the  
8 court relied on.

9 Q. And do you know if the court actually relied on  
10 anything?

11 A. I thought so. I may be mistaken, but thought  
12 the transaction was the key factor that the court used.

13 Q. It was disclosed to the court. But did you see  
14 anything indicating that the court actually looked at the  
15 papers given that it was uncontested?

16 MR. RAMSEY: Form.

17 A. Maybe if you show me the document, I can  
18 refresh my recollection. Sitting here today, I don't  
19 remember.

20 Q. Do you remember that action was not contested?

21 A. I don't remember.

22 Q. In terms of what was submitted to that court,  
23 did you consider the description that Lester Eber gave to  
24 the court of what Eber-Metro was worth in your analysis?

25 MR. RAMSEY: Form.

1           A.    My valuation analysis is indicated in this  
2           report. I don't remember what Lester said when  
3           reflecting my valuation. So I would have to look at what  
4           he said. Maybe what he said is in there. I just don't  
5           know.

6           Q.    Okay. This is previously marked Exhibit 45.  
7           It's an affidavit from Lester Eber dated March 14, 2012.  
8           I am going to direct your attention specifically to  
9           Paragraph 6. Okay.

10          A.    If you don't mind, I am going to read the  
11          context of this.

12          Q.    Sure. Okay.

13          A.    Okay.

14          Q.    Have you seen this before today?

15          A.    I don't remember seeing this.

16          Q.    And is there any new information in there for  
17          you?

18          A.    I don't know if this is new. It is valuing  
19          Eber-Connecticut at 4.6 million.

20          Q.    And that's based on the Pole-Bridge Bowman  
21          transaction you understand, correct?

22          A.    It doesn't say that.

23          Q.    I guess it says very recent arm's-length sales  
24          on the open market. Do you think that's referring to  
25          Pole-Bridge Bowman?

1 MR. RAMSEY: Form.

2 A. I don't know.

3 Q. Is it your understanding that the Pole-Bridge  
4 Bowman transaction was conducted on the open market?

5 A. I think by open market it means at fair market  
6 value. I don't know. I am not sure what open market  
7 means in this context. But does it say that Pole-Bridge  
8 Bowman is n here somewhere?

9 Q. I am not sure it's in this document. I will  
10 represent to you another document filed by the lawyers  
11 reference only the Pole-Bridge Bowman transaction and did  
12 not reference any other transactions involving the  
13 company.

14 A. Okay.

15 Q. So I want to draw your attention in particular  
16 to the last line there. It says, "Because it,  
17 Eber-Connecticut, is Metro's only significant asset that  
18 79 percent interest valued 3.66 million itself  
19 establishes the value of Metro." So he didn't mention  
20 anything about any liabilities there, correct?

21 A. No.

22 Q. Do you know why that is?

23 MR. RAMSEY: Form.

24 A. No.

25 Q. Do you consider this statement by the purchaser

1 of Eber-Metro about his understanding of its value to be  
2 relevant to your analysis?

3 A. Well, it seems to be contradicted on its face  
4 anyways. It seems to contradict what I have been  
5 provided as a legal assumption. I don't know. I mean,  
6 you know, whether -- so this seems to be consistent with  
7 your legal definition as opposed to the legal definition  
8 that I was provided with. But it also seems to  
9 contradict what I said earlier, that an investor would  
10 certainly reflect those liabilities and any assessment of  
11 Eber-Metro. Best I can do with that.

12 Q. And I think you may have answered this before,  
13 but I wanted to make sure I understand. In your opinion,  
14 the purpose that Lester Eber and Eber Wine and Liquor  
15 had for entering into this transaction doesn't affect  
16 your valuation analysis; is that right?

17 A. The purpose?

18 Q. Such if the purpose was to shield assets from  
19 creditors, would that affect your analysis?

20 A. I mean it doesn't affect my solvency opinion.  
21 It doesn't affect my valuation the Eber-Connecticut.  
22 Those stand independent. Whether the trier of fact  
23 somehow because of what you say is true that they think  
24 this transaction should be undone accordingly -- that's  
25 really a finding that the court may or may not. But it

1 doesn't -- no. It doesn't really affect my opinion.

2 Q. Okay.

3 A. Unless I am missing something.

4 Q. If the transaction is engaged in for the  
5 purposes of shielding assets, doesn't that affect the  
6 probability that contingent liabilities would be assessed  
7 against it?

8 MR. RAMSEY: Form.

9 A. I think if that was the -- for example, if an  
10 investor -- let's hypothetically say Lester did that, it  
11 may affect his view -- specific investment view. But it  
12 doesn't affect, you know, what I think that a reasonable  
13 investor would assess in this particular instance.

14 Q. So in your opinion, you think a reasonable  
15 investor would look at this transaction and think that it  
16 would not be a successful way of shielding Eber-Metro and  
17 its interest in Eber-Connecticut from the creditors of  
18 Eber Brothers Wine and Liquor Corp; is that right?

19 A. I think that's fair.

20 Q. Now, you have done a lot of corporate  
21 transactions and valuating them. Have you ever seen a  
22 transaction with the same general setup as this, where an  
23 officer or director of a company transfers it to himself  
24 on the grounds that he is a creditor foreclosing on a  
25 loan that he had given to the company?

1           A.    It's pretty specific facts.

2           Q.    We can open it to officer or director.

3           A.    Okay. I mean the best I can think of -- I have  
4    been involved in cases where the company has been taken  
5    private by officers or directors. And as I said, there  
6    has been cases in which in a transaction the common  
7    shareholders got nothing because of priority claims. But  
8    nothing is coming to my mind about a single case that  
9    contains all those facts.

10          Q.    Right. I think is it fair to say the  
11   distinguishing feature is how this company was acquired  
12   through a creditor foreclosure attempt as opposed to a  
13   more transparent sale or purchase?

14               MR. RAMSEY: Form.

15          A.    So you're asking me if I have been involved in  
16   a case --

17          Q.    Let me step back. In those cases where  
18   management acquired the company, took it private and  
19   whatnot, is it fair to say there were a number of  
20   procedural protections that were involved to ensure that  
21   shareholders were not getting shafted?

22               MR. RAMSEY: Form.

23               MR. CALIHAN: Form.

24          Q.    Ensure that shareholders were not being taken  
25   advantage of?

1 MR. RAMSEY: Form.

2 MR. CALIHAN: Form.

3 A. So the cases that I am thinking about are cases  
4 in which the shareholders believed they were being taken  
5 advantage of and the process to determine that was in  
6 litigation, if that answers you.

7 Q. Were there any steps taken by management at the  
8 time of the transaction? Did they get a fairness  
9 opinion?

10 A. Yes. There were steps, but the steps were  
11 contested.

12 Q. Was the transaction disclosed to the  
13 shareholders before it was commenced or closed?

14 A. Yes.

15 Q. And do you know whether this transaction in  
16 this case was disclosed to the trust beneficiaries before  
17 it was concluded?

18 A. Well, let's see. My recollection is that the  
19 other trust members or beneficiaries were provided with  
20 the opportunity to participate in raising new capital.  
21 That I do remember. I have seen a letter. And I just  
22 don't remember whether that particular letter also  
23 contained the -- or any other letter contained the, you  
24 know, my words -- the foreclosure, the extinguishing of  
25 the common equity.

1           Q.    So I think I know what you're referring to. I  
2           think you're referring to giving other trust  
3           beneficiaries, you know, the opportunity to loan money to  
4           the company under the line of credit that Lester  
5           established?

6           A.    Kind of like a rights offering. You want to  
7           maintain your position, you've got to pony up the money  
8           or else you're going to get left out. It's kind of like  
9           that. Not exactly.

10          Q.    An equity offering is different than a loan  
11          offering, right? Typically creditors don't get to just  
12          convert their debt to equity unless it's clearly labeled  
13          as a convertible note of some kind?

14               MR. RAMSEY: Form.

15          A.    Or unless the equity is worth zero.

16          Q.    Then you're saying in that case the creditor  
17          would convert the debt to equity that's worth zero?

18          A.    The creditor de facto becomes the residual  
19          claimant, I.E. the equity holder. If there is no equity  
20          above it, it becomes the front line and it bears all the  
21          risk and reward for the prospects of the that company at  
22          that point in time, which is what happened here.

23          Q.    Do you know what the typical remedy is for a  
24          creditor who is trying to foreclose on a debt that has  
25          not been paid by a company?



1 MR. RAMSEY: Form.

2 Q. What usually happens?

3 A. Sorry?

4 Q. So a creditor loans money to a company.

5 Company doesn't pay it. Creditor tries to foreclose on  
6 the debt. Does he acquire ownership of the company?

7 MR. RAMSEY: Form.

8 A. You're kind of in an area, I am not sure what  
9 the legal steps are. My recollection here is that there  
10 is -- if you default on your debt payments, the next step  
11 is bankruptcy. And then following bankruptcy there could  
12 be some kind of reorganization or it could be that the  
13 debt holders become the residual claimants.

14 Q. Did you inquire as to why there was no  
15 bankruptcy in the case of Eber-Metro, Eber Wine and  
16 Liquor or Eber-Connecticut?

17 MR. RAMSEY: Form.

18 A. No. That goes beyond what I was considering.  
19 You know, if you're suggesting to me that was illegal to  
20 do that, that's not under my purview.

21 Q. In your report you also offer an opinion on the  
22 reasonableness of the interest rates on Lester's loans,  
23 correct?

24 A. Yes.

25 Q. Now, is it fair to say you didn't conduct any

1 sort of work like forensic accounting and whatnot to  
2 determine whether those loans were correctly stated or  
3 validly entered into in the first place?

4 A. No.

5 Q. So you simply assumed them to be valid on their  
6 face at the stated rates of interest?

7 A. Yes.

8 Q. And you used the 9 percent interest rate on the  
9 2006 loan even though it was just handwritten in by  
10 Lester?

11 A. I did.

12 Q. Have you seen that before, where the person who  
13 is getting the interest unilaterally increases the  
14 interest rate by a handwritten notation?

15 MR. RAMSEY: Form.

16 MR. CALIHAN: Objection to form.

17 A. I don't remember one way or other.

18 Q. And one of the things you said it was -- those  
19 rates were consistent with the debt by distress companies  
20 that you had tracked?

21 A. Yes.

22 Q. Would it affect your opinion about whether the  
23 interest rates that Lester, himself, was receiving were  
24 reasonable if Lester, himself, was responsible for the  
25 company being distressed?

1 MR. RAMSEY: Form.

2 A. So you're saying that there was some  
3 impropriety and I don't know purposely driving down the  
4 value or something?

5 Q. If something like that happened, would that  
6 affect the reasonableness of the interest rates?

7 MR. CALIHAN: Form.

8 A. Well, it goes well beyond the reasonableness of  
9 the interest rate. No. I don't think -- the interest  
10 rate is predicated on the financial distress of the firm.  
11 If you're saying the firm itself is in financial distress  
12 because Lester wanted it to be in financial distress that  
13 goes to the valuation in its entity.

14 Q. And so you're saying that if there was evidence  
15 and a fact finder concluded that Lester wanted the  
16 company to be in financial distress so he could foreclose  
17 on his loan and take ownership of it, that would make  
18 your valuation analysis less reliable?

19 MR. RAMSEY: Form.

20 A. Let me be specific. If there -- I mean  
21 analysis implies that this company is being run to  
22 maximize shareholder value. There is no fraud being  
23 imposed upon shareholders. And that there is no purpose  
24 in fully driving down the value. If the finder of fact  
25 concludes that's the case, then yes. You know, the

1 financial numbers that I am using would be fraudulent.  
2 It's kind of like your example of statements. I don't  
3 know what I would do with that.

4 Q. Would diverting corporate opportunities outside  
5 the company constitute conduct on your view -- would be  
6 the sort of misconduct to drive down the value of the  
7 company along the lines that you mentioned?

8 MR. RAMSEY: Form.

9 A. Well, you've can kind of gone to, you know, if  
10 a trier fact concluded there were improprieties. Now  
11 that I am drawing conclusions about improprieties.  
12 That's not in my purview.

13 Q. You mentioned fraud. Is it fair to say that  
14 diverting corporate opportunities is another kind of  
15 misconduct that could be something that would affect  
16 valuation?

17 MR. RAMSEY: Form.

18 A. That's not my purview. If the judge determines  
19 it, so be it. I am not going to weigh in what  
20 constitutes whether it's poor management, mismanagement,  
21 fraudulent management. Those are not issues that I am  
22 going to weigh in on or I consider my expertise.

23 Q. Have you ever been retained to value a  
24 corporate opportunity under the doctrine of usurp -- of  
25 corporate opportunities or diversion of corporate

1 opportunities?

2 A. I don't even know what that is. Doctrine of  
3 what?

4 Q. You're not familiar with the corporate  
5 opportunity doctrine?

6 A. No.

7 Q. So is it correct to say that you have not, in  
8 connection with this case, looked at all into whether  
9 Lester Eber diverted corporate opportunity when he  
10 received \$600,000 a year from Southern while he was still  
11 being employed as the president and CEO of Eber Brothers?

12 MR. RAMSEY: Form. Go ahead.

13 A. I have not.

14 Q. And you have not conducted an analysis to see  
15 whether if Eber Brothers was receiving \$600,000 a year  
16 from Southern from 2007 through 2012 or how that would  
17 have affected the valuation as of mid-2012; is that  
18 right?

19 MR. RAMSEY: Form.

20 A. As a side payment thing? Is that what you're  
21 saying?

22 Q. I will set the facts from you. Lester Eber has  
23 part of the transaction in which -- and we're just -- I  
24 am not necessarily saying these are the facts. We can  
25 call this a hypothetical. Lester Eber when he is

1 negotiating the sale of assets New York, Ohio and  
2 Delaware of Eber Brothers. And money for that is  
3 transferred to Eber Brothers from Southern. He also  
4 negotiates a side deal for himself in which he gets  
5 \$600,00 a year for five years for Southern for consulting  
6 while remaining president of Eber Brothers and also  
7 becoming president of Eber-Connecticut and receiving a  
8 salary in accordance with that work at the same time. So  
9 with that fact pattern and what my question is, did you  
10 conduct any sort of analysis to see whether if \$600,00  
11 more income had been paid to Eber Brothers rather than to  
12 Lester Eber for that five-year period, the valuation of  
13 the company as of 2012 would have been significantly  
14 positive?

15 MR. RAMSEY: Form.

16 A. No.

17 Q. On Page 16 of your report footnote 25, you've  
18 got a citation notion case where it says, "While it is  
19 true that an arm's-length transaction thus so called  
20 willing buyer, willing selling test is the best evidence  
21 of and often the easiest method to determine fair market  
22 value is by no means the only such evidence." Do you see  
23 that?

24 A. Yes.

25 Q. Do you agree with that statement, that an

1 arm's-length transaction is the best evidence of fair  
2 market value?

3 A. Well, it's certainly a key piece of evidence if  
4 the arm's-length transaction is for the same thing. As I  
5 said before, when the transaction itself has substantial  
6 rights being granted to either the purchaser or the  
7 seller, then you can't use that transaction on its face.  
8 You have to make adjustments. And those adjustments of  
9 course become, you know, a difficult thing to measure in  
10 and of themselves. What is the value of those particular  
11 rights? And that tends to be a function of the facts and  
12 circumstances of function of the value of the company  
13 itself -- the capital structure. So it's just difficult.  
14 And that's kind of the situation that were at here.

15 Q. So it sort of leads me to my next point. So on  
16 the Eder-Goodman transaction is the most obvious  
17 arm's-length transaction -- closest in time, anyway. Why  
18 didn't you make any -- I understand you made adjustments  
19 for the additional rights that Eder-Goodman for some of  
20 them. You didn't make any adjustments in the other  
21 direction for the restrictions on their stock that was  
22 atypical, did you?

23 A. Restrictions on their stock? I thought the two  
24 issues that I thought were highly material and highly  
25 valuable had to do with the ROFR and, you know, the

1 preferred characteristics. There are other rights that  
2 they got that I did not value that presumably had value.  
3 And, you know, not as much as those two. To the extent  
4 there were restrictions, I don't remember the exact  
5 restrictions. But the thing I was most concerned about  
6 were the two key -- the two key rights that without  
7 question have value. I mean I think even in your  
8 complaint suggested that is significant value to the  
9 rights of first refusal. I don't think there is any  
10 disagreement.

11 Q. We certainly appreciated that part of your  
12 opinion. So, no. I am not talking about that. You  
13 earlier testified that a restriction of marketability is  
14 something you need to discount for; is that still your  
15 view?

16 A. If you're trying to sell to an individual -- a  
17 number of small individuals -- then marketability becomes  
18 an issue. If the marketability discount generally when  
19 you ask a practitioner -- a valuation practitioner and  
20 you're saying I am selling a large block of shares, then  
21 the marketability discount becomes pretty much de minimis  
22 and nobody factors that in. So it's really relevant if  
23 you're selling one share or two shares and trying to  
24 understand, you know, what would you get if you sell, you  
25 know, a very, very small fraction of the total shares.



1           Q.    Are you aware of whether there were  
2           marketability restrictions on Eder-Goodman's 15 percent  
3           interest?

4           A.    I don't remember.

5           Q.    Direct you to -- this is what's been previously  
6           marked as Exhibit 57, Section 7.1. Restriction on  
7           disposition. And actually I'll let you take a look at  
8           that. I need to take a five-minute break here.

9                   (Whereupon, there is a short recess in the  
10           proceedings.)

11          Q.    Let's go back to this.

12          A.    Uh-huh.

13          Q.    All right. I want to ask you a little bit more  
14           about your decision to not consider the acquisition of  
15           Slocum in 2005 as a valuation.

16                   MR. RAMSEY: Are we not doing this?

17          Q.    I am sorry. I didn't have it in my hands.  
18           Let's stick with that. You had a chance to review  
19           Section 7.1?

20          A.    Yes.

21          Q.    And do you see there that it limits the  
22           potential transferees of Eder-Goodman's interest to the  
23           parent companies of Eder-Goodman?

24          A.    Yes. No provision of the agreement governs the  
25           proposed disposition? What were the provisions of this

1 agreement?

2 Q. Well, I think it's a legal question. So for  
3 purposes of today, let's assume this is a restriction on  
4 transfer for Eder-Goodman. I don't want to have you go  
5 through the whole document. I will represent to you to  
6 assume that Eder-Goodman cannot transfer its 15 percent  
7 interest without complying with this section.

8 A. Okay.

9 Q. Because there is tag-along rights. I think  
10 those are the other provisions. Based on that, this is a  
11 restriction to the marketability of those shares; fair to  
12 say?

13 A. Under your hypothetical.

14 Q. Okay. And under this hypothetical, would that  
15 affect your valuation of the transaction?

16 A. Well, it could. I mean I think what you're  
17 basically suggesting to me that your interpretation of  
18 what you're saying is that look you've got to, you know,  
19 if you're going to do the most important right, you've  
20 got to do all the rights and all the restrictions and do  
21 valuation of all these things if they are not present for  
22 the purchaser of the shares. So I would have to do some  
23 real hard thinking here to see what -- what are the  
24 restrictions that would govern the sale of  
25 Eber-Connecticut -- not the 15 percent interest, but all

1 the other shares -- the ownership interest given this  
2 agreement. And I haven't. You know, there are other  
3 marketability discounts no matter who buys these shares,  
4 even if it's a block interest. So I haven't really  
5 thought about the marketability. I haven't taken any  
6 marketability discount on any of these valuations. So I  
7 would have to consider that and weigh all of the  
8 restrictions that would normally apply to anybody who is  
9 buying these shares, you know, outside of the Eder.

10 Q. So as compared to right of first refusal where  
11 a party can transfer it, but someone else who has the  
12 right of refusal can come in and take it away from them  
13 to -- that impairs transfer because it makes potential  
14 buyers less willing to go in for it; is that correct?

15 A. Yes. I think that's fair. In this case in  
16 particular it makes it extraordinarily difficult for any  
17 distribution company that wants to retain synergies by  
18 acquiring Eder to do so because of the Eder right of  
19 first refusal.

20 Q. Although since Eder is also in the wine and  
21 liquor business it would have the same synergies?

22 MR. RAMSEY: Form.

23 A. Didn't they pay for it through this right of  
24 first refusal? That's the point. Now you finally get  
25 it. That's exactly what they paid for. They got

1       effectively paid a control premium because now they are  
2       retaining the synergies. I think you finally understand  
3       the point.

4           Q. But they also can't ever get out of this  
5       investment by transferring it to someone else themselves?

6           A. Again, I would have to take a hard look at  
7       this.

8           Q. Let's assume that's true. They are restricted  
9       on the ability to dispose of the stock. So as long as the  
10      company is going concern, they have to keep their money  
11      in there. Doesn't that affect the value of it?

12           MR. RAMSEY: Form. Go ahead.

13           A. If there is no similar restrictions when the  
14      other 85 percent interest is sold, you know, what a  
15      willing buyer would be interested in paying for this is  
16      going to be dictated by the other terms and conditions.  
17      I am not sure whether the marketability discount would  
18      apply to a buyer, too.

19           Q. I believe that it does say in there that in  
20      order to comply with this potential thing -- if they were  
21      to transfer it to their parent companies, then they have  
22      to agree to the same terms as all other parties in this  
23      agreement or if there is any transfer that may be allowed  
24      by this for any member has to -- they have to be bound by  
25      any agreement. And I think it was mainly for Eber-Metro.

1 But is it -- this is a restriction on transfer that says  
2 the others party can simply veto it. That's not a right  
3 of first refusal, right?

4 A. Say that again?

5 Q. So assuming that this permits Eber-Metro to  
6 simply say no to any potential transfer, that's a right  
7 of first refusal, correct?

8 A. No.

9 Q. That's just a right of refusal?

10 A. Yes.

11 Q. Have you seen that before?

12 A. Yes. In fact, it doesn't -- yes. I have seen  
13 that before. When there is restrictions on who you can  
14 sell to, when you can sell. Restricted stock is kind of  
15 like that.

16 Q. So for the right of first refusal you came up  
17 with a percentage of 15 percent as far as what the  
18 potential value is. What percentage would you assign to  
19 the right of refusal, assuming that's what this is?

20 MR. RAMSEY: Form.

21 A. You can't get control for buying 15 percent of  
22 this company. And that's what they owned is 15 percent  
23 of the company. So, again, we're sort of missing each  
24 other on the level what the ROFR is accomplishing.

25 Q. Well, they can't transfer the ROFR either.

1 That's the point, I guess. Remember that's part of it.

2 A. Why would they have to? The point is -- and I  
3 think we just touched on this point -- is that this was  
4 effectively paying a control premium. That is what's  
5 impounded in that price that they paid. I mean, that's  
6 the economics behind it. So the essence of the value of  
7 the ROFR has to do with the direct effect on obtaining a  
8 control premium and some later transaction. There is no  
9 premium associated with the 15 percent. So the same  
10 logic can't apply. Whether there is a marketability  
11 restriction, possibly -- possibly. I would have to go  
12 through the entire document to understand exactly what  
13 would occur and what other members are facing with regard  
14 to the marketability discount vis-a-vis this document or  
15 other documents for the members. But, you know, yeah.  
16 It's possible that the ultimate conclusion is that there  
17 may be with some marketability discount whether that  
18 applies to all shares, now we're in the realm of well  
19 minority discounts and marketability discounts. And by  
20 the way, that also opens the door, I think, to  
21 understanding these other rights. You know, for example,  
22 on Page 28, Line E, no major decisions shall be effective  
23 binding on the company unless approved by unanimous  
24 consent of all members. They are one of the members.  
25 That's a pretty substantial right, too. That says, "Hey,

1 we can veto whatever we want to veto."

2 Q. It's limited to ten items.

3 A. They are pretty important items, aren't they?

4 Q. But none of the business decisions about the  
5 direction of the company?

6 MR. RAMSEY: Form.

7 A. Or do they? You know, selling the company. I  
8 mean, you know, look, my attempt here was to try to  
9 understand the two key valuable rights in particular  
10 eliminating -- in my opinion, eliminating the control  
11 premium is substantial. For a company in distress, the  
12 priority rights on the preferred stock is very  
13 substantial.

14 Q. All right. Now, did you see anything in the  
15 LLC agreement that gives Eder-Goodman any right to  
16 control the day-to-day operation of the business?

17 A. I have to go back and look.

18 Q. Do you recall seeing that?

19 A. You know, I have a recollection, but I would  
20 have go back and read the document.

21 Q. Does a control premium usually convey along  
22 with it when someone pays that the ability to manage the  
23 company?

24 A. Yes.

25 Q. And in this case, it does not, correct? They

1 get one seat out of the seven on the board.

2 MR. RAMSEY: Form.

3 Q. Does that sound like control of the management?

4 A. Well, when you eliminate the potential for a  
5 company to -- the potential to get a bidder to come in  
6 and buy your company and get a control premium, you've  
7 effectively limited the control premium.

8 Q. Now, what if in this case the Eber family that  
9 owns Eber-Metro and Eber-Connecticut has no desire to  
10 ever sell the business. Does that not reduce the adverse  
11 effect of the right of first refusal and also the  
12 guaranteed purchase price?

13 A. So your question is if the Eber --

14 Q. If Eber-Metro has no intention to ever consider  
15 selling the business.

16 MR. RAMSEY: Form. Go ahead.

17 A. Let me see if I can explain this in terms you  
18 can understand. If someone bought an asset that you  
19 owned as valuable, but you don't put a lot of value into  
20 it. But you know that they think it's valuable. Would  
21 you give it away for free? Would you say, "I don't put  
22 much value into it. And even though you do, I going  
23 number charge you for it. Here it is. Take it away."  
24 That doesn't make sense to me. There is an opportunity  
25 there. And so why would an economic player when money is



1 at stake just give away something that the buyer thinks  
2 is valuable? That, for reasons I am talking about here,  
3 is why it's valuable. Understanding full well even  
4 though today I may not have interest in selling, it  
5 pretty much locks me in. And I am giving that up for  
6 nothing. That doesn't make sense to me. That's kind of  
7 what you're proposing. If I don't value it, I am going  
8 to give it away. I wouldn't. I don't think you would  
9 either.

10 Q. And by the same token, is it correct that if  
11 Eber-Metro understood it had created a loophole in the  
12 right of first refusal by allowing it to sell Eber-Metro  
13 itself without triggering any of that, that would not  
14 effect the valuation either?

15 MR. RAMSEY: Form.

16 A. Well, if it created a loophole and it knew it  
17 created a loophole, it's not going to undercut its price  
18 from Eder, right?

19 Q. As long as Eder doesn't see it, right?

20 A. You're saying they didn't see it. Well, you're  
21 making two suppositions. One, there is a loophole and  
22 the other is they didn't see it.

23 Q. Okay. Assuming that was the case and perhaps  
24 it was even something that was concealed from them and  
25 intention to transfer Eber-Metro and the transaction was

1       deemed to be fraudulent, is the fact that a transaction  
2       was fraudulent in terms of the intent of the seller, does  
3       that affect its ability to be used as a precedent  
4       transaction?

5                   MR. RAMSEY:   Form.

6           Q.     If the buyer bought it in good faith?

7           A.     Wow.   You lost me on this one.   I'm sorry.   I  
8       don't understand the question.

9                   MR. CALIHAN:   Objection to form.

10          Q.     So I just want to make sure I understand what  
11       may come out of your mouth at trial.

12          A.     Fair enough.

13          Q.     If a transaction was entered into with  
14       fraudulent intent by the seller, but the buyer was a  
15       bonafide purchaser, would the fact that the transaction  
16       had fraudulent intent on the seller's part affect the use  
17       of the transaction as precedent for valuation purchases?

18                  MR. RAMSEY:   Form.   Go ahead.

19          A.     I don't know.

20          Q.     Me either.   I am genuinely asking.   In terms of  
21       the guaranteed purchase price, for that you put in a  
22       25 percent premium, correct, for Eder-Goodman?

23          A.     The priority claims?

24          Q.     Yes.

25          A.     Yes.   I mean at minimum 25 percent.   The

1 company distress, you know, it could be substantially  
2 more than that.

3 Q. Why wasn't that Eder-Goodman's interest ever on  
4 any balance sheets listed at preferred interest?

5 A. I don't know.

6 Q. Did that affect opinion at all?

7 A. I mean, I looked at that contract. That seemed  
8 pretty clear to me. They get priority. I don't know how  
9 else to interpret it. Why that doesn't appear -- it's  
10 technically not preferred stock. I don't know what the  
11 accounting rules are. I can't tell you why it's not  
12 listed as much.

13 Q. Now, in your experience does preferred stock  
14 typically have some sort of way of accreting value beyond  
15 what the common stock does prior to it being redeemed?

16 A. You mean like a dividend?

17 Q. Like a dividend or interest rate, essentially  
18 that.

19 A. Well, preferred stock wouldn't have an interest  
20 rate.

21 Q. Not exactly interest. But there is a  
22 percentage that it will increase overtime, say?

23 A. Sometimes.

24 Q. And there was nothing like that associated with  
25 the Eder-Goodman?

1           A.    This was not preferred stock. It was common  
2           stock that had priority. You know, I call it preferred  
3           stock, but I say it is the similar characteristics and  
4           similar economic analysis of the convertibility preferred  
5           stock, but it wasn't. It was common stock that had this  
6           right attached to it.

7           Q.    When there is preferred stock and common stock  
8           and there is distribution to shareholders in a typical  
9           corporation, does that money typically bypass the  
10          preferred stockholders, or do the preferred stockholders  
11          have some greater interest --

12          A.    It depends. I have seen arrangements where  
13          common stockholders cannot get any distributions unless  
14          the preferred stockholders are paid. I have seen other  
15          instances where that's not the case. I don't know there  
16          is any steadfast rule governing.

17          Q.    Preferred stock is essentially a creature of  
18          contract; is that fair to say?

19          A.    A company is a nexus of contracts. Contracts  
20          with suppliers. Contracts with employees. Contracts  
21          with stockholder, bondholders. You know, the economic  
22          term is that a firm is a nexus of contracts.

23          Q.    But the relationship between a company and its  
24          common shareholders is not something that is defined by  
25          any sort of contract between the common shareholder and

1 the company. It's defined by laws, correct?

2 A. Well, I mean, I can only tell you that when  
3 economists write about the theory of a firm they call the  
4 firm a nexus of contracts. It's not a person. It's not  
5 an entity. It's a nexus of contracts. If you dispute  
6 that, then you can talk to Professor Jensen because that  
7 was his insight.

8 Q. With respect to preferred stock; is it correct  
9 that preferred stock can have almost any terms that it  
10 wants to have in there?

11 A. I don't know. I have seen preferred stock with  
12 different terms. I don't know what the rules are with  
13 regard to preferred stock.

14 Q. Do you know whether corporations owe fiduciary  
15 duties to stockholders?

16 MR. RAMSEY: Form. Go ahead.

17 A. They certainly owe a duty to the preferred  
18 stockholders if the company gets into financial distress  
19 because they are next in line. I don't know whether that  
20 only kicks in when the value of the equity starts to  
21 diminish close to zero. I just don't remember.

22 Q. In terms of the Eder-Goodman interest in  
23 Eber-Connecticut, what rights did it have with respect to  
24 ordinary distributions during the course of business that  
25 did not occur upon a change of control or a sale of the

1 assets?

2 A. I don't remember.

3 Q. Okay. I will represent to you that it received  
4 a pro rata that was 15 percent of any distribution.

5 A. Okay.

6 Q. Is that consistent with your recollection?

7 A. I just don't remember.

8 Q. Does the fact that Eder-Goodman had no right to  
9 a greater amount of regular distributions that didn't  
10 occur upon a sale of the company or substantially all of  
11 its assets affect your valuation?

12 A. No. My analysis has to do with a company like  
13 this in financial distress and in who is on the front  
14 line, who gets paid first if any money comes in. So if  
15 you have a company that is in financial distress and it's  
16 either liquidation or there is some kind of acquisition,  
17 if the valuation is low with regard to its liabilities  
18 and these guys get first dibs on anything that is coming  
19 in on 4.5 million dollars, that is pretty substantial.

20 Q. So the answer to that was no? Just making sure  
21 in terms of the ordinary dividends were not a factor.

22 A. That did not factor into my analysis.

23 Q. Where did you get the 30 percent number for the  
24 historical control premium that you used?

25 A. You know, that is a number that has been kind

1 of used as a general finding from the academic literature  
2 on merges and acquisitions. I think if you looked to  
3 some of the papers written by Professor Gerald, Bradley  
4 Desai Kim, recently papers by Professor Berneil  
5 (phonetic). Those pretty much kind of provide some rough  
6 approximation of what the premiums have been.

7 Q. Did you actually reference that for your  
8 report?

9 A. I don't remember if I have or not.

10 Q. Consistent with the general rule of providing  
11 things, I request the citation for this number, wherever  
12 it came from, be provided. So in terms of going back to  
13 the 2005 acquisition of Slocum, you said you did not  
14 consider that because, I guess, two reasons. One is the  
15 2003 financial results indicated positive net income.  
16 And because you did not have 2004 financial results; is  
17 that right?

18 A. Yes.

19 Q. Would you expect to see 2004 final results as  
20 something that was taken into consideration in this  
21 transaction given that it was closed in April of 2005?

22 A. Yes.

23 MR. RAMSEY: Form.

24 Q. Do you know whether those were even available  
25 before the transaction was priced?

1 MR. RAMSEY: Form.

2 A. I don't know.

3 Q. Did you ask anyone?

4 A. Yes.

5 Q. What did they say?

6 A. They couldn't find any financials for 2004.

7 Q. And no one indicated to you that they will  
8 related to 2004 financials when pricing the transaction;  
9 is that right?

10 A. No.

11 Q. Did anyone indicate that they relied on  
12 Slocum's earnings at all in pricing the transaction?

13 A. No. I don't remember having that conversation.

14 Q. What would your opinion change in terms of  
15 whether -- would any of your opinions change in your  
16 report if you learned that Slocum's earnings prior to  
17 being acquired did not significantly affect the purchase  
18 price that Lester Eber was willing to pay for it?

19 MR. RAMSEY: Form. Go ahead.

20 A. No.

21 Q. Why not?

22 A. Well, I am trying to establish a relationship  
23 between -- however you arrive at your valuation, I am  
24 trying to establish a relationship between the value and  
25 profitability to apply that ratio at a later point in



1 time in 2012. So, you know, if he didn't consider it and  
2 the ratio was high because he thought it was valuable,  
3 that would be applied in 2012. But I mean I just got to  
4 have the numbers. You could say that for any  
5 transaction. What did you look at? Did you look at  
6 this? Well, you can't use the ratio. That don't make  
7 sense.

8 Q. I am asking specifically here if you learned  
9 that Lester Eber said that whether the company made money  
10 or not did not affect his decision about how much to pay  
11 for the company, would that affect your opinions?

12 MR. RAMSEY: Form.

13 A. No. I don't think so. I would have to think  
14 about that. I mean -- I just don't know what to do with  
15 that. You're saying there is no economic basis  
16 completely detached.

17 MR. RAMSEY: Don't start speculating.

18 Q. If the purchase was made for purely strategic  
19 reasons without an expectation of necessarily generating  
20 profits from the Eber-Connecticut entity itself, would  
21 that affect which valuation you relied on?

22 A. I suppose that is another reason not to use it.  
23 If it's completely divorced from the expected cash flows.  
24 That there is some kind of strategic reason. I don't  
25 know how that would apply in 2012.

1 Q. You're familiar with the concept of goodwill in  
2 an acquisition, correct?

3 A. I am.

4 Q. And do you know what the amount of goodwill  
5 that was associated with the Eber-Connecticut by  
6 Eber-Metro on its balance sheet?

7 A. I do not.

8 Q. Does 14 million dollars sound about right?

9 A. I don't remember.

10 Q. Does the amount of goodwill that is allocated  
11 by a company after an acquisition affect your valuation  
12 analysis?

13 A. The goodwill is the difference between the  
14 purchase price and the value of the assets. I forget  
15 which kind of transaction where the value of the assets  
16 grossed up. But in large measure it's going to be the  
17 difference between the book value of the assets and the  
18 purchase price. So whether the book value of their  
19 assets at that time represent the market value is the  
20 question. So consequently you can have substantial  
21 amount of goodwill on the books, but that can also  
22 translate to the fact that assets as they're on the  
23 balance sheet do not reflect market value.

24 Q. In order to determine -- let's step back. If  
25 you actually valued the assets of Slocum rather, you

1 know, saying you used the Prospect Beverages multiple  
2 apply it to Slocum beforehand. And then you get the  
3 assets value and you find out the amount paid was  
4 10 million dollars over that. What do you do with that  
5 10 million dollars in terms of your other valuations or  
6 trying to value the company at a later date? Does it  
7 affect it at all?

8 MR. RAMSEY: Form.

9 A. I mean the steps you just went into are not  
10 what I do. Why would I apply -- I am confused. It  
11 sounds like you're saying you first have to value Slocum  
12 in order to value Eber-Connecticut and value Slocum using  
13 another multiple, but not the purchase price of Slocum.

14 Q. I am asking you, I guess, if you could test the  
15 reliability of your preferred multiple by applying it to  
16 that actual transaction. The company was acquired. And  
17 saying, "Okay. Based upon the financials at the time  
18 this company should have been worth X amount the dollars,  
19 but they paid Y amount of dollars more than that." And,  
20 therefore, use that as a way to test whether your  
21 preferred metric is actually something that is a reliable  
22 indicator of the market value of the company given there  
23 is a disparity between of the actual market value for the  
24 transaction and your calculation?

25 MR. RAMSEY: Form.

1           A.    Let me see. I am having a hard time. Let me  
2    see if I can -- see if this responds to your question.  
3    And I think you began with the hypothetical that the  
4    price paid for Slocum far exceeds what any one  
5    stand-alone valuation of Slocum would be. Now, you  
6    called strategic, but frankly nobody would pay a price  
7    above a stand-alone value unless someone believed that  
8    it's going to generate synergies from this acquisition.  
9    So that is a proxy. The incremental piece is a proxy for  
10   what I say is given up by the ROFR. That huge premium  
11   that you're talking about is exactly my point. That's  
12   what's given up. That's the kind of -- if that is -- if  
13   what you're proposing is correct, then that's exactly  
14   what I am talking about. Somebody is paying for the  
15   company a lot more than its stand-alone value because  
16   they think that they are going to be able to extract a  
17   lot a value from it.

18           Q.    Sure.

19           A.    And that's exactly what you're giving up from  
20   this ROFR.

21           Q.    It goes back to the ROFR, I guess. But in that  
22   instance does it at least call into the question the  
23   other comparable based methodologies that you're using.  
24   If the comp transactions that you want to use cannot come  
25   close to accounting for the actual amount of money that

1 was paid either in the Slocum purchase by  
2 Eber-Connecticut or in the Eder-Goodman acquisition,  
3 which had its ROFR, doesn't that cause you -- wouldn't  
4 that cause you to question the reliability of the metric  
5 based on Prospect Beverages?

6 MR. RAMSEY: Form.

7 A. No. Quite the contrary. I think, you know,  
8 under the hypothetical that you gave me if it's correct,  
9 it indicates that my adjustment based on the ROFR is way  
10 too small.

11 Q. Okay. So the ROFR adjustment could be larger,  
12 correct, is what you're saying in that instance?

13 A. Yes. I mean predicated on your conclusion that  
14 is exactly what it would tell me. That I was too  
15 conservative in assessing the value. And I ought to  
16 increase it substantially if what you tell me about  
17 Slocum is true. You know, if the strategic alliance  
18 between two companies causes Lester to pay a huge amount  
19 in excess of the stand-alone value to Slocum, that's  
20 presumably what would accrue to another company, but  
21 that's precluded. And I say effectively precluded by the  
22 ROFR. So that's what you're giving up. And that's what  
23 I was trying to say before. You know, whether if Lester  
24 valued it or not, if he knows they valued it and put in  
25 their contract as to how many they valued that. So did

1 Southern. While doggone it. I am going to charge you  
2 for that. I paid for it back here. I am going to charge  
3 you for that same.

4 Q. Right.

5 A. Now in this transaction price. Yeah. I mean  
6 that's a very interesting point. And I think it does  
7 provide me with a lot of comfort with regard to this  
8 ROFR.

9 Q. Unless of course the ROFR is not applicable of  
10 the sale of Eber-Metro which is ultimately the entity  
11 that you were valuing, right?

12 MR. RAMSEY: Form.

13 A. Your legal construct there.

14 Q. Right. So is that an agreement that that would  
15 change things?

16 MR. RAMSEY: Form.

17 A. Again, I would have to go through and  
18 understand that, you know, given what you said -- I've  
19 got to understand the documents and make my own  
20 determination of it. If you're representing to me that  
21 Metro could do whatever it wanted. It could sell --  
22 effectively sell Eber-Connecticut and they couldn't do  
23 anything about it. Then they overpaid.

24 Q. But that wouldn't change it from being a  
25 reliable basis for determining the actual value of

1 Eber-Metro with its true control just because they were  
2 tricked into paying a high amount, doesn't mean that it's  
3 not a fair value for the true control premium, correct?

4 MR. RAMSEY: Form.

5 A. So --

6 Q. Let me rephrase. Eder-Goodman paid the  
7 high-end price because they thought it was getting a ROFR  
8 that was partial control interest essentially or half of  
9 a control premium in your view, correct?

10 A. Yes.

11 Q. If it turns out they were wrong about that,  
12 then ultimate control rested with Eber-Metro. So if  
13 you're valuing Eber-Metro, then there shouldn't be a  
14 discount based upon the earlier price by Eder-Goodman.  
15 And, in fact, it would be effective of Eber-Metro would  
16 be worth.

17 A. So the court determines that Eber-Metro could  
18 effectively sell control of Eber-Connecticut. I agree.  
19 Then you can have a control premium. I find it hard to  
20 believe, but who knows.

21 Q. So the training comparable is the part of your  
22 analysis. You used four companies that had been  
23 identified by Wendy Eber in a presentation to the PBGC?

24 MR. RAMSEY: Form.

25 A. Yes.

1 Q. Why did you look at those companies?

2 A. As I said before, one of the things that I  
3 always take into account is front-line managers. What do  
4 they think about their company. They typically have the  
5 best view as to what they think are reasonable proxies  
6 for their company. And, you know, Wendy is a CPA. She  
7 has an MBA from the Simon School. She's been running  
8 this company since I think 2008. I can't remember. So  
9 she has been involved in this company. She is an  
10 intelligent person and she looked at these. I thought  
11 well, okay. And if she looked at these and she thinks  
12 they are reasonable proxies, then let me do the same  
13 thing. Let me take a look at that. Although I looked at  
14 them, I felt that three out the four really didn't fit  
15 the characteristics that I was looking for.

16 Q. You're saying that you didn't see  
17 Eber-Connecticut as similar to Cisco Corporation?

18 A. Or Pepsi Cola. As I said earlier, one of the  
19 key determinations is, you know, market capitalization.  
20 There generally is a premium associated with the high  
21 market companies. This company was in financial  
22 distress. So there was profitability. There is  
23 profitability at these other companies. So for those  
24 financial reasons it didn't seem appropriate for me to  
25 make use of those figures.



1 Q. And so you did end up doing some calculations  
2 based on Farmer Brothers, right?

3 A. Yes. I included Farmer's. That was a negative  
4 EBITDA as of 2012. It's not in the liquor distribution,  
5 but it is a distribution company. So there were some  
6 similarities with regard to the business characteristics.  
7 So I felt it was appropriate to include that. And as I  
8 said, I think that an investor would also be interested  
9 in what the front-line managers have to say. I think  
10 they would have engaged in that same analysis. And they  
11 would have done that estimate based upon Farmers and  
12 included that in this range of potential possible values.

13 Q. When did the Farmer Brothers transaction close?

14 A. That's not a transaction. That's a trading  
15 print up. So that's based upon their trading multiple.

16 Q. And is there any indication that Farmer  
17 Brothers were considered to be a comparable company at  
18 the time of the transaction?

19 A. I don't know.

20 Q. So did you review the entire response that  
21 Wendy Eber gave to PBGC in which these trading comps were  
22 included?

23 A. You know, I have a vague recollection. I  
24 couldn't -- I know I put my eyes on it at one point. My  
25 recollection is that PBGC came up with some kind of value

1 of like 7 million for Eber-Connecticut. Whatever Wendy  
2 gave them, that's what they came up with.

3 Q. And what was your sense of what Wendy -- what  
4 objective Wendy had when she was communicating with the  
5 PBGC and providing these trading comparables?

6 MR. RAMSEY: Form.

7 A. Well, that there was -- I mean they had these  
8 liabilities. And PBGC was looking at this as the key  
9 operating company that stood behind these liabilities.  
10 And I suspect that the motivation was look, we don't have  
11 any money. We can't pay these substantial liabilities.  
12 That would be my sense. And the PBGC of course and  
13 looked at and said it's worth 7 million.

14 Q. Did that context cause you to be skeptical of  
15 the comparables that she was suggesting even though she  
16 is closely connected to the business?

17 MR. RAMSEY: Form.

18 A. You know, as I said, I didn't use three out of  
19 the four anyway. I thought they were inappropriate. So  
20 you know, again, there is problems with all these  
21 metrics. This was done for a particular purchase. You  
22 know, I don't think she would have provided those  
23 comparables if she thought they weren't comparable.

24 Q. Even she was trying to avoid paying a 5 million  
25 dollar liability?

1 MR. RAMSEY: Form.

2 A. Pardon?

3 Q. Do you know what position Wendy Eber took with  
4 PBGC about whether Eber-Connecticut was liable for the  
5 pension plan?

6 A. I don't know.

7 Q. Would that affect your opinion, the reliability  
8 of Farmer Brothers as a trading comp based on her  
9 selection of it?

10 A. I don't know why.

11 Q. Why didn't you look for other trading comps  
12 beyond the four that Wendy selected?

13 A. I did. I did look for any kind of liquor  
14 distribution company -- pure play liquor distribution  
15 company that again was similar of size or close to the  
16 size that had negative profit. And I did not find any.  
17 There are companies that engage in liquor distribution.  
18 But, for example, Constellation is one, but they also  
19 make their own liquor. So it was, you know, and they are  
20 profitable. They were profitable in 2012. I didn't find  
21 any.

22 Q. I want to turn your attention to Page 36 of  
23 your report. You got a summary of assets there. And you  
24 list the first one the demand note receivable from  
25 Pole-Bridge Bowman.

1 A. Uh-uh.

2 Q. How did you come up with that number? Just for  
3 the record, \$350,000.

4 A. So that was from the 2011 tax return --  
5 corporate rate tax return for Eber Brothers Wine and  
6 Liquor. Well, it's Eber Brothers Wine and Liquor Metro.  
7 And on Page 5 of that there is lists on Line 14 other  
8 assets \$350,001.

9 Q. So why didn't you account for any of the  
10 accrued interest on that note?

11 A. Was there any?

12 Q. Yes. The two percent number was very small,  
13 but I don't know that it's so small as to not to show up  
14 on the thing.

15 A. Yeah. I don't see it.

16 Q. So from the tax return, it appears that the  
17 company ignored the interest on that?

18 MR. RAMSEY: Form.

19 A. I don't know. You think it would be here.

20 Q. If the company itself did not appear to treat  
21 the two percent interest under the note as an actual part  
22 of the note, would that further affect your willingness  
23 to reply on the Pole-Bridge Bowman transaction as a  
24 legitimate arm's-length transaction?

25 MR. RAMSEY: Form.

1           A.    I don't know if it's further. I told you  
2           before that I have a problem with the transaction. I've  
3           got a problem with it -- a problem with all the  
4           transactions, but that's an issue that I have with  
5           Pole-Bridge Bowman.

6           Q.    Prior to being engaged in this lawsuit, did you  
7           know Lester or Wendy Eber?

8           A.    No.

9           Q.    Had you heard of Eber Brothers?

10          A.    No.

11          Q.    Did you know any of the lawyers at Underberg  
12          and Kessler before this lawsuit?

13          A.    Yes.

14          Q.    Who did you know?

15          A.    Paul Keneally.

16          Q.    And you worked with him before?

17          A.    I worked with him on a case back in the '90s.  
18          I think he was just an associate at that point. I don't  
19          think I've had another case with him since then.

20          Q.    Is that how you met him, or did you know him  
21          separately from work?

22          A.    No. I think that's how I met him.

23          Q.    Did you have any interactions with Paul  
24          Keneally since then prior to this case?

25                   MR. RAMSEY: Professional or in general?

1 Q. Professional or personal.

2 A. Rochester is a small town. So, yes. I would  
3 see him on the golf course occasionally, you know, out at  
4 dinner. Things like that -- same restaurant.

5 Q. And when were you engaged for this case?

6 A. That's a good question. I meant to look at  
7 that. I forgot. I just don't know how long it's been.  
8 Several months.

9 Q. Was it over a year ago?

10 A. I don't think so.

11 Q. And I understand you disclosed your hourly  
12 rates and you might not have the dollar amount right on  
13 you. Approximately, how much have you been paid so far  
14 for your work in this case?

15 A. I've been paid all that's been billed. But I  
16 don't know what the amount is. Like I said, I meant to  
17 look at the invoices. I haven't done so.

18 Q. The last time I asked this question I got  
19 \$40,000 to \$400,000. So could you be a little more  
20 specific?

21 A. I can't give you that range. I just don't  
22 know. It's not 400,000.

23 Q. Ballpark figure is it over \$100,000?

24 A. No.

25 Q. And in terms of preparing the exhibits, was

1       that something that you did personally, or was that done  
2       by your assistant?

3             A.    I haven't prepared a spreadsheet in 2015 years.

4             Q.    Okay. So we won't blame you for the few  
5       errors.

6             A.    No. You can blame me. I am responsible. I  
7       will take the blame.

8             Q.    Okay. Do you know Judge Rosenbaum?

9             A.    I don't think so.

10            Q.    Did you know Elliot Gumaer, Mike Gumaer?

11            A.    No.

12            Q.    You've obviously testified a ton of times.  
13       Have you ever had your testimony excluded by a court?

14            A.    There was a security litigation matter in which  
15       one of my opinions was excluded by Judge Rakoff in a case  
16       called Lehman Brothers. And he said that he said --  
17       well, he said a lot of things. He said that my analysis  
18       was not reliable with regard to loss causation with  
19       regard to how analysis recommendation affects stock  
20       prices.

21                   MR. RAMSEY: A portion of your testimony.  
22                   Not the entity at of it?

23                   THE WITNESS: Right.

24            Q.    Any other times has your testimony been  
25       excluded?

1           A.    Not that I can recall, no. That was the one  
2           case. And that was, I think 2008. Maybe 2009.

3           Q.    Have you withdrawn from an engagement based  
4           upon your belief that your client or the clients in the  
5           case were misleading you?

6           A.    Well, I've withdrawn from cases. I don't  
7           remember if it was -- I don't think it was because I felt  
8           I was being misled. It was -- the cases that I've  
9           withdrawn from are cases where as the facts become known  
10          to me, I felt that it was not something that I could --  
11          didn't fit into the financial opinion. It was not  
12          supported. So, yes. I have a number of cases.

13          Q.    And to be clear, you don't expect that to  
14          happen in this case because your opinions are all based  
15          on the facts as they have been presented to you, correct?  
16          You haven't attempted to engage in your own fact-finding?

17                   MR. RAMSEY: Form.

18          A.    That's fair. I have not.

19                   (Whereupon, there is a short recess in the  
20          proceedings.)

21          Q.    All right. So before we get to the exhibit. I  
22          want to ask you a little bit more about -- I am not going  
23          to make you go through the documents, the way in which  
24          the value of the Eber-Connecticut and Eber-Metro was  
25          presented to the court in 2012 in connection with the



1 transaction when they were trying to get it deemed  
2 commercially reasonable. In that case, one of the things  
3 they did was took the value at the date of the  
4 Pole-Bridge Bowman transaction and said that's the value  
5 of the company. And they subtracted the company's  
6 reported losses from that value to arrive at a current  
7 valuation. Were you familiar with that methodology that  
8 was put in there?

9 A. No, I don't remember.

10 Q. Does that methodology sound correct to you?

11 A. No.

12 Q. Why not?

13 A. Well, I mean I understand the logic, but I  
14 wouldn't do it that way. You know, as I said before,  
15 ultimately the valuation is the expected future cash  
16 flows. So if you're valuing it based upon that  
17 transaction and you think that's a reasonable  
18 transaction, what happened that ensuing years is not  
19 something I would reflect. I would take that multiple  
20 and apply it to 2012.

21 Q. So if the same math was done with the 2005  
22 acquisition the Slocum taking 21.6 million and then just  
23 subtracting the losses from the next seven years, you  
24 would disagree with that valuation method?

25 A. Yes.

1 Q. But would it also be logical?

2 A. I understand why someone would think about  
3 doing it. If you think that multiple has bearing as of  
4 today, then you think that the growth rate implied by  
5 that multiple has equal bearing. And regardless of what  
6 it was for the last two years, you would take that  
7 multiple and apply it times to today's revenue or  
8 whatever it was. That is the general way that I think  
9 about how multiples are applied. I'm not a fan of trying  
10 to take the valuation as of that point in time and then  
11 subtract out the ensuing profits or losses. Whatever the  
12 case may be.

13 Q. Is that methodology something that you  
14 discussed with Wendy Eber or Lester Eber?

15 A. No. That's my methodology.

16 Q. I meant the one that was used in the court  
17 proceeding?

18 A. No.

19 Q. So you never asked why did you use that  
20 methodology?

21 A. No.

22 Q. Did you consider using that methodology here as  
23 an alternative?

24 A. No.

25 Q. Were you aware that methodology had been used?

1           A.    I may have been. I mean I am not influenced by  
2    it.

3           Q.    You don't remember it as you sit here today?

4           A.    Like I said, I understand the logic behind it.  
5    But I would be hard pressed to find any authoritative  
6    book that suggests to apply that kind of methodology to  
7    do valuation.

8           Q.    And given the credentials that Wendy Eber has,  
9    would it surprise you that she would use that method for  
10   a valuation like that?

11               MR. RAMSEY: Form. Go ahead.

12           A.    Like I said, I understand the logic behind it.  
13   But if your valuation -- if you studied that stuff --  
14   teach it, you don't do it that way. I mean, you know, I  
15   could appreciate if you pick up a Brielle Myers textbook  
16   that you may be able to rationalize using that approach.  
17   But, you know, if you study this stuff, you realize  
18   that's not what's done.

19               (Whereupon, Exhibit Number 131 was marked for  
20   identification at this time.)

21           Q.    Okay. So I've got in front of you  
22   Exhibit 131, which is the December 2018 letter regarding  
23   the pension liability with respect to PBGC that you  
24   reference in your report. Do you see that?

25           A.    Yes.

1 Q. Did you have any contact with the person who  
2 prepared this, Michael Gallagher?

3 A. I have a vague recollection of being on a  
4 conference call in which he participated in.

5 Q. What was discussed on the conference call?

6 A. What the value of the pension liability was.

7 Q. And there was a number of contemporaneous  
8 records indicating what it was believed to be at the  
9 time?

10 A. There were some calculations I think that he  
11 had done at that point in time. But it didn't provide  
12 the number of present value of these liabilities. That's  
13 my recollection.

14 Q. The pension liability that was listed -- that  
15 was not an amount that was due and payable at the time,  
16 right, that was a future funding obligation?

17 A. Yes.

18 Q. So in an event of a liquidation, it wouldn't be  
19 the case that PBGC would be entitled to receive that full  
20 amount that you used the 5 million dollars in such a --

21 A. You're asking a real question?

22 Q. If the amount of money is not currently due and  
23 it's essentially based on actuarially estimates and it  
24 could change wildly, why do you use a particular --

25 MR. RAMSEY: Form.

1           Q.    We're almost done here.  Why do you use that  
2           particular number for an insolvency analysis?

3           A.    You've got to account for the underfunded  
4           pension liabilities.  So it's the assets minus the  
5           present value of future liabilities.  That's the  
6           prescription.  That's what's done in valuation and  
7           exercises.  You can pretty much find that in any book.  
8           And I am not doing a liquidation analysis.

9           Q.    Right.

10          A.    So your premise is that under liquidation the  
11          number would be different.  Okay.  But I am not doing a  
12          liquidation analysis.  I am trying to understand what is  
13          the underfunded nature of this pension plan per actuarial  
14          analysis, and that's what this guy provided.

15          Q.    Do you know whether that sort of analysis could  
16          be used to file a voluntary bankruptcy petition by saying  
17          that, you know, we can't fund this pension plan for the  
18          next twenty years.  So therefore we're insolvent?

19               MR. RAMSEY:  Form.

20          A.    I don't know.

21          Q.    This is not a liability that appears in a  
22          company's balance sheet, right?

23          A.    Well, if it did, we could have got the balance  
24          sheet number.  But this was a number that he prepared as  
25          you say 2018 to estimate what that underfunded pension

1 plan was.

2 Q. And do you know whether -- did you have anyone  
3 check the work that was done by Michael Gallagher for  
4 this? Did any of your staff?

5 A. I am not an actuary. None of the people I work  
6 with are actuaries. So I relied upon his calculations  
7 for that number.

8 Q. You said it's typically your practice not to  
9 rely on information that becomes available after the  
10 event -- after the date of valuation that you're using,  
11 correct?

12 A. Uh-huh.

13 MR. RAMSEY: Yes?

14 A. Yes.

15 Q. So is it fair to say that you it is not your  
16 typical practice to rely on a letter like this from a  
17 third party to try to calculate the value of a contingent  
18 liability from six years earlier?

19 MR. RAMSEY: Form.

20 A. No. That's incorrect. He is not using  
21 information beyond this year -- beyond 2012. So the test  
22 is is it known or knowable at that point in time. So  
23 presumably if somebody is thinking about making an  
24 investment -- under due diligence they are going to say  
25 what is the amount of underfunded pension liabilities.

1 Call Michael. He will tell you. So notwithstanding the  
2 information was provided to me as of 2018. The analysis  
3 itself was based upon information that was available as  
4 the 2012. So it's known or knowable as of that point of  
5 time.

6 Q. Again, just so the record is clear here, you're  
7 not someone who is qualified to perform this sort of  
8 actuarial analysis, correct?

9 A. No.

10 Q. And to your knowledge, Michael Gallagher is not  
11 going to be testifying as an expert alongside you,  
12 correct?

13 A. I have no idea.

14 Q. All right.

15 MR. RAMSEY: You didn't utilize him other  
16 than this letter?

17 THE WITNESS: No.

18 Q. Did you engage him to prepare this letter?

19 A. No.

20 Q. And do you have any way of knowing whether the  
21 numbers in this letter are accurate or reliable?

22 A. No.

23 Q. Now, you have done a lot of work relating to  
24 PBGC in the past you said, correct?

25 A. Yes, several cases.

1           Q.    Have you ever seen a situation where PBGC  
2           insisted on taking a company's last assets in order to  
3           fund a pension?

4           A.    Now, I think general rule -- I am not sure what  
5           circumstances this applies. I think their general rule  
6           is if the value of the assets is less than the  
7           liabilities that they have some kind of default of taking  
8           30 percent of the assets.

9           Q.    So in this case, you determined that the value  
10          of the assets was less than the liabilities, correct?

11          A.    Yes.

12          Q.    Did you apply any sort of discount to take into  
13          account PBGC's usual conduct?

14          A.    No.

15          Q.    Why not?

16          A.    I didn't think it was appropriate. And, you  
17          know, I noted that notwithstanding they had the lien of  
18          30 percent. There was a term that the remainder of the  
19          employee liability in the amount of at this point  
20          4 million in accordance with their demand for payment.

21          Q.    What are you referencing?

22          A.    A letter dated 2016 from PBGC Eber Brothers  
23          Wine and Metro.

24          Q.    Can you read the bates number on that just for  
25          the record?



1           A.    EB00030922.

2           Q.    And I am not going to make you go through the  
3 process of actually giving me your entire binder and  
4 making it an exhibit as I think I have the right to do.  
5 Instead I am going to ask you, what is in that binder?

6           A.    As you note in my report, I cite many, many  
7 things. Notwithstanding the 30 percent control premium  
8 question. There is lot of footnotes that cite to a lot  
9 of documents. Some internal documents, some papers, some  
10 books. So what my people do as a regular matter is they  
11 put all the citations, the back-up citations behind each  
12 page in my report based upon those footnotes. So for  
13 Page 11 there is a bunch of things that I reference.

14          Q.    That's what has been -- I haven't noted it  
15 every time, but just for the record, that has been  
16 referenced a few times during this deposition.

17               MR. RAMSEY: Fair enough.

18               MR. BROOK: I think that is all I've got.

19               COURT REPORTER: Who wants a transcript?  
20 Are you each paying for your own?

21               MR. RAMSEY: Yes.

22               MR. BROOK: Yes.

23               (Whereupon the deposition concluded at  
24 3:32 p.m.)

25                               \*\*\*

1 STATE OF NEW YORK

2 COUNTY OF MONROE

3 I, Leah Didsbury, a Notary Public in and for the  
4 State of New York, do hereby certify:

5 That the witness whose testimony appears herein  
6 before was, before the commencement of his testimony,  
7 duly sworn to testify the truth, the whole truth and  
8 nothing but the truth; that such testimony was taken  
9 pursuant to notice at the time and place herein set  
10 forth; that said testimony was taken down in shorthand by  
11 me and thereafter under my supervision transcribed into  
12 the English language, and I hereby certify the foregoing  
13 testimony is a full, true and correct transcription of  
14 the shorthand notes so taken.

15 I further certify that I am neither counsel for nor  
16 related to any parties to said action, nor in anywise  
17 interested in the outcome thereof.

18 IN WITNESS WHEREOF, I have hereunto subscribed  
19 my name on this 6th day of September 2019.

20  
21  
22 

23 Leah Didsbury  
24  
25

A C K N O W L E D G E M E N T

I, FRANK TORCHIO, certify  
that I have read the transcript of my  
testimony taken under oath on AUGUST 23,  
2019, and that the transcript is a  
true, complete and correct record of  
what was asked, answered and said  
during this deposition, and that the  
answers on the record as given by me  
are true and correct.

\_\_\_\_\_  
FRANK TORCHIO

Signed and subscribed to  
before me, this \_\_\_\_\_ day  
of \_\_\_\_\_, 201\_\_.

\_\_\_\_\_  
Notary Public

1

**ERRATA SHEET**

2

**VERITEXT LEGAL SOLUTIONS**

3

**330 OLD COUNTRY ROAD**

4

**MINEOLA, NEW YORK 11501**

5

**516-608-2400****NAME OF CASE: Kleeberg, et al. v. Eber, et al.****NAME OF DEPONENT: FRANK TORCHIO**

6

**DATE OF DEPOSITION: 8/23/2019**

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**FRANK TORCHIO**

22

**SUBSCRIBED AND SWORN TO BEFORE ME**

23

**THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.**

24

25

\_\_\_\_\_

**(NOTARY PUBLIC)**

\_\_\_\_\_

**MY COMMISSION EXPIRES:**

[&amp; - 5-200]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF APRIL 1, 2019. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

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COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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